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WM. R. STAN

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 34.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

APPELLEES' BRIEF UPON RE-ARGUMENT.

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vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, BERWICK FARMERS GRAIN COMPANY, HAMPDEN FARMERS ELEVATOR COMPANY, GRANDIN FARMERS GRAIN COMPANY, WALHALLA CO-OPERATIVE ELEVATOR COMPANY, GLENFIELD CO-OPERATIVE ASSOCIATION, FARMERS CO-OPERATIVE ELEVATOR COMPANY OF CANDO, BENEDICT FARMERS CO-OPERATIVE ELEVATOR COMPANY, FARMERS ELEVATOR & MERCANTILE COMPANY OF ROGERS, CAYUGA FARMERS ELEVATOR COMPANY, LYBECK GRAIN COMPANY, I. L. BERGE ELEVATOR COMPANY, REGAN & LYNESS ELEVATOR COMPANY, KENSAL FARMERS ELEVATOR COMPANY, CHAMLEY BROS. GRAIN COMPANY, GWINNER FARMERS GRAIN COMPANY, FREEBORN ELEVATOR COMPANY, HAZEN GRAIN COMPANY, ELDRIDGE FARMERS ELEVATOR COMPANY, CARRINGTON GRAIN COMPANY, PINGREE GRAIN COMPANY, FARMERS GRAIN COMPANY, CARGILL ELEVATOR COMPANY, OCCIDENT ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF NORTH DAKOTA, W. M. NODDINGS, DOING BUSINESS AS THE NODDINGS GRAIN COMPANY, L. L. KRUCHTEN, DOING BUSINESS AS THE PERTH ELEVATOR, J. C. SMITH, DOING BUSINESS AS ALEXANDER GRAIN COMPANY, F. M. COOK, DOING BUSINESS AS THE WOODWORTH GRAIN COMPANY, JOHN A. AIRD, ALEXANDER HARCHANKO, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, ROBERT FLEMING, JAMES WHELAN, PIERCE BLEWETT, DOING BUSINESS AS THE STAR ELEVATOR COMPANY, HANS NEILSON, DOING BUSINESS AS THE ELK VALLEY FARMS COMPANY, E. H. RAY, ARNOLD BROS., C. H. SHELDON, LOUIS GJERE, DOING BUSINESS AS THE CANDO GRAIN COMPANY, SCHILLING & KRUGER, O. B. SORENSON, V. W. STEELE, DOING BUSINESS AS JUD ELEVATOR COMPANY, JOHN SOUTHALL, J. A. FRANK, H. C. SORENSON, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, JOHN BIBELHEIMER, DOING BUSINESS AS THE WASHBURN GRAIN COMPANY, N. O.

PARSONS, DOING BUSINESS AS THE INDEPENDENT GRAIN COMPANY, A. C. ANDREWS, DOING BUSINESS AS THE ANDREWS GRAIN COMPANY, ALL IN THE STATE OF NORTH DAKOTA, AND ACME GRAIN COMPANY, ATLANTIC ELEVATOR COMPANY, GEORGE C. BAGLEY ELEVATOR COMPANY, COLUMBIA ELEVATOR COMPANY, DODGE ELEVATOR COMPANY, EMPIRE ELEVATOR COMPANY, GREAT WESTERN GRAIN COMPANY, IMPERIAL ELEVATOR COMPANY, MILLER ELEVATOR COMPANY, MINNEKOTA ELEVATOR COMPANY, MONARCH ELEVATOR COMPANY, NATIONAL ELEVATOR COMPANY, NORTHLAND ELEVATOR COMPANY, OSBORNE-MCMILLAN ELEVATOR COMPANY, POWERS ELEVATOR COMPANY, RUGBY ELEVATOR COMPANY, ST. ANTHONY & DAKOTA ELEVATOR COMPANY, VICTORIA ELEVATOR COMPANY, WINTER-TRUESDELL-AMES COMPANY, WOODWORTH ELEVATOR COMPANY, AND INTERNATIONAL ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF MINNESOTA, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

APPELLEES' BRIEF UPON RE-ARGUMENT.

STATEMENT OF CASE.

This case involves the validity of a statute of North Dakota known as the North Dakota Grain Grading Act, which was passed as an initiated measure at a general election held in the State of North Dakota on November 7, 1922. The appellees herein brought an action in the Federal District Court to restrain the enforcement of that law, on the ground that it was invalid because in conflict with the Commerce Clause and the Fourteenth Amendment of the Federal Constitution, as well as with the United States Grain Standards Act. The appellees asserted that the action thus brought was ruled—as to the conflict with the Commerce Clause—by the decisions of this court holding a like statute invalid, i. e., *Lemke v. Farmers Grain*

Company of Embden, N. D., decided February 27, 1922, and reported in 258 U. S. page 50, and *Lemke v. Homer Farmers Elevator Company, et al.*, decided the same date and reported in 258 U. S. 65; and—as to the conflict with the United States Grain Standards Act—by the decision of the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635.

The court below, consisting of Circuit Judge William S. Kenyon and District Judges J. W. Woodrough and J. S. Elliott, sitting as the District Court, pursuant to Section 266 of the Judicial Code, granted a temporary injunction against the enforcement of this initiated law. The present appeal questions in this court the correctness of that ruling.

This case was originally on the calendar on the October Term, 1922, and was set down for argument April 30, 1923, at which time briefs were filed and the case was argued. Thereafter, and on January 5, 1925, this court restored the case to the October Term, 1924, calendar and set the case for re-argument "on all the questions involved, particularly including the following:

> No. 1. Whether the North Dakota statute of 1922 differs materially in its provisions and operation from the statute of 1919 which was held invalid by this court in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, and *Lemke v. Homer Farmers Elevator Co.*, 258 U. S. 65.
>
> No. 2. Whether and to what extent section 17 of the statute of 1922 gives effect to and continues in force the provisions of the statute of 1919.
>
> No. 3. Whether and in what particulars the statute of 1922 encroaches upon the field of regulation occupied by the United States Grain Standards Act or conflicts with that act or with its administration."

These questions were argued in the original brief filed, but not under the above headings. We are rewriting the brief to correspond more closely to the suggested questions, including, however, in this brief all the points and argument contained in the original brief.

The 1922 statute replaced the 1919 statute. The same regulation is applied to the same situation.

The law here involved was initiated and passed to replace Chapter 138 of the Laws of North Dakota for 1919 declared unconstitutional by this court in *Lemke v. Farmers Grain Company of Embden* and *Lemke v. Homer Farmers Elevator Company, et al., supra.* This is shown not only by the fact that the initiated law covers the same ground as the 1919 act, but as well by the express grant to the officials created by the new law of the right to exercise the powers and perform the duties theretofore performed by the officials designated in the old law.

The instant case comes to this court on a record which discloses a situation identical with the situation involved in the two prior *Lemke* cases referred to above—both as to the interstate commerce movement of wheat and the method of purchasing such grain in that commerce. The appellees in the present case are either identical or engaged in like business with the appellees in the former case. They purchase grain from the farmers of North Dakota for shipment to the large terminal markets beyond the state and their respective elevators are operated for the purpose of facilitating this purchase and transportation. In the former case this initial purchase of grain under the circumstances existing then and now was definitely determined by this court to be an integral part of interstate commerce, the court stating:

> "The complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce."
> *Lemke v. Farmers Grain Company,* 258 U. S. at 54-55.

The general scope and purpose of the former act, as found by this court, is identical with the scope and purpose of the instant act. Referring to the former act, this court stated:

> "This act shows a comprehensive scheme to regulate the buying of grain. * * * Nor will it do to say that the

state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

Lemke v. Farmers Grain Company, 258 U. S. at pages 56-8.

The initiated law states its purpose as follows:

"An act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors and warehouses handling such farm products; and making an appropriation therefor."

While this declared purpose applies generally to farm products, the act itself, like its predecessor, relates to grain. In the initiated law, like its predecessor, the regulation is of the marketing of grain. The marketing does not precede, but is an integral part of the interstate commerce.

The claimed evils, against which relief is sought by giving the State of North Dakota, through its officials, authority over the marketing of grain in North Dakota, existed prior to the enactment of each law and formed the basis and the reason for each law alike. Referring to these claimed evils, this court stated:

"It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

Lemke v. Farmers Grain Company of Embden, 258 U. S. 60-61.

Instead of acting in harmony with the suggestion of this

court above made, the one time North Dakota State Inspector of Grades, now a United States Senator of that state, on the 16th day of March, 1922—nineteen days after the filing of the decision by this court—introduced into the Senate a bill for an act in effect attempting to modify the Constitution of the United States, as construed by this court, so that no article should be deemed to be in interstate commerce or subject to federal control or jurisdiction until the same shall have been loaded for shipment and a bill of lading issued providing for its transportation beyond the borders of the state, and until such time such product shall remain subject to the laws of the State. (Senate file 3290.) This was followed by bills introduced by a Representative of the State of North Dakota likewise providing that prior to the delivery of grain to a carrier for transportation beyond the State, such grain shall be subject to the operation and effect of the laws of the State (H. R. file 735), and another bill changing the application of the United States Grain Standards Act by providing that it shall not apply at any time prior to the delivery of grain for transportation in interstate commerce. To complete this state control program, someone framed and submitted to the electors of the State of North Dakota the present act, embodying the plan and purpose of the State through state officials to control the grading and marketing of North Dakota grain.

The appeal to Congress for relief, like the appeal to the electors of the state, was not for regulation of interstate commerce by Congress, but for abandonment by Congress of the field committed to it by the Federal Constitution and for the delegation to the State of a power essential to the Federal regulation of interstate commerce. This attitude of the North Dakota Federal delegation and of the electors of the State clearly harks back to the ante-constitution situation of the states, when each state, whether wisely or not, claimed and frequently exercised the right to control the manner and terms upon which its products should leave the state or the products of other states

should be brought into the state.

We do not deem it necessary, in arguing the instant case, to extensively review the facts involved in the former decision of this court or to refer to the many decisions of this court in which the broad control of the Federal government over interstate commerce is announced or to the decisions of this court in which the authority of the state to directly regulate, hamper or interfere with interstate commerce is denied. The verbal changes in the new act are not important. The application of this vital rule and broad principle is not dependent upon the particular terms in which regulation is expressed. Not the manner, but the fact, of interference with interstate commerce by the State is of moment. If the direct interference actually results, the particular method through which such interference occurs becomes unimportant. If the decision of this court in *Lemke v. Farmers Grain Company of Embden* referred to above is *freely and fuly accepted* as establishing the invalidity of the former act, we think it will clearly appear that its governing rule must establish the invalidity of the intiated statute.

For convenience in comparing the terms of the two Acts, we have printed below the full text of the 1922 Act and the important portions of the 1919 Act in such manner as to indicate readily a comparison of the specific provisions of each Act bearing on any particular point, and have printed in bold type those portions of the two Acts which have a direct bearing on the questions here involved.

(1922 Act.)

THE NORTH DAKOTA GRAIN GRADING ACT OF 1922.

An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors, and warehouses handling such farm products; and making an appropriation therefor.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

Section I. **For the purpose of encouraging, promoting and safeguarding agriculture, commerce and industry, and preventing confiscation of dockage, unjust discrimination, fraud and extortion in the marketing of all kinds of grain, seed and other agricultural products,** we, the people of the state of North Dakota do hereby establish a uniform system of grading, weighing and measuring all kinds of grain, seed and other farm products, and this act shall be known as the "North Dakota Grain Grading Act."

Section II. The Board of Railroad Commissioners of the state, on or before the 8th day of December, 1922, shall appoint for a term of four years, a supervisor of grades, weights and measures, who shall be an expert in the grading, weighing and measuring of all kinds of grain, seeds and other agricultural products; and such supervisor shall immediately assume the duties of his office and shall receive a salary of $3,600 per annum. In case of death, resignation or inability of such supervisor, the vacancy shall be filed in like manner for the unexpired term, and thereafter such supervisor shall be appointed in like manner.

Section III. The State Supervisor of Grades, Weights and Measures shall maintain his office and principal place of business at the Agricultural College of this

(1919 Act.)

THE NORTH DAKOTA GRAIN GRADING ACT OF 1919.

(Extracts.)

Sec. 1. The Governor of the State of North Dakota, on or befor the 30th day of June, 1919, shall appoint for a term of four years a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds and other agricultural products) to be the State Inspector of Grades, Weights and Measures, who shall receive, with the approval of the State Board of Regents, the sum of One Thousand Dollars per annum.

(1922 Act.)

state, and shall make and enforce such orders, rules and regulations as are necessary to carry out the provisions of this act. It is hereby made the duty of all of the departments of the Agricultural College (and especially of the State Experiment Mill at said College), to assist and co-operate with the State Supervisor of Grades, Weights and Measures in analyzing and testing all kinds of grain, seeds and other farm products for the purpose of establishing just and uniform grades, weights and measures for same.

Section IV. It shall be the duty of the State Supervisor of Grades, Weights and Measures to fix and establish as soon as may be after the enactment hereof for the purpose of preventing fraud and wrongful handling of grain, seed and other farm products, and protecting the producers of the same in connection with the marketing thereof, grades, weights and measures for all kinds of grain, seed and other farm products and he shall prescribe standards of quality and conditions of same, and shall in a general way investigate and supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; provided however that whenever the Secretary of Agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agricultural products under the United States Grain Standards Act, such grades, standards of quality and condition, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this state. In establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer.

Section V. That whenever grades, weights and measures

(1919 Act.)

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(c) To establish uniform grades for grain, seeds or other agricultural products for the State of North Dakota with power to alter and modify such grades;

(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain, seeds and other agricultural products with power to summon, subpoena and compel the attendance of witnesses, and the production of books and papers, and administer oaths whenever it may be necessary for more effective discharge of his duties, and shall have the power to punsh for contempt.

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

Sec. 23. The State Inspector of Grades, Weights and Measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products.

Sec. 3. It shall be the duty of the Inspector of Grades, Weights and Measures to proceed at once to define and establish uniform

(1922 Act.)

shall have been fixed and established under the provisions of this act for any grain, seed or agricultural products by the State Supervisor of Grades, Weights and Measures, or by the Secretary of Agriculture of the United States, then no person thereafter shall buy by grade any such farm product unless it shall have been inspected and graded by an inspector licensed under the provisions of this act, or under the provisions of the United States Grain Standards Act, and the grade by which it is bought be one of the grades fixed and recognized under the provisions of this act; provided, that any person may buy any such products by sample or by type or under any name, description or designation which is not false or misleading and which name, description or designation does not include in whole or part the terms of any official grade or grain standard established or recognized by this act. Nothing herein shall prohibit producers from buying grain, seed or other agricultural products from one another.

Section VI. The State Supervisor of Grades, Weights and Measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill handling agricultural products, provided that such buyer, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the State

(1919 Act.)

grades and weights for grain, seeds or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

Sec. 14. It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a Deputy Inspector of Grades, Weights and Measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products without first procuring a Deputy Inspector of Grades, Weights and Measures' license, provided, however, that this section shall not prohibit State Deputy Inspectors from inspecting, weighing and grading grain, seeds and other agricultural products under the direction and supervision of the State Inspector of Grades, Weights and Measures. Provided further that this section shall not prohibit producers from buying and selling grain, seed and other agricultural products to one another.

Sec. 15. Any person may without a license buy any grain, seeds or other agricultural products that have been graded, inspected and weighed by a Deputy Inspector of Grades, Weights and Measures, or State Deputy Inspector of Grades, Weights and Measures.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

Sec. 11. The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products or the buyer or agent of a privately

(1922 Act.)

Supervisor of Grades, Weights and Measures. The condition of such license shall require such person to honestly and correctly fix grades and dockage of grain and seed inspected at their respective places of business and to honestly and correctly weigh the products so inspected and graded according to the provisions of this act and the rules and regulations made hereunder.

Section VII. The State Supervisor of Grades, Weights and Measures may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has short-weighted or has taken for his own use valuable dockage without compensation, or has issued any false certificate of grading or has violated any of the provisions of this act or of the United States Grain Standards Act. Upon such suspension or revocation, if the licensee is not satisfied with the decision of the State Supervisor of Grades, Weights and Measures, he may appeal to the District Court of his county and have such order reviewed. All licenses issued under this section shall terminate on the 30th day of June each year. Each person receiving such license shall cause same to be conspicuously posted at his place of business, provided that any person may without a license and according to provisions of the United States Grain Standards Act and the rules and regulations promulgated thereunder by the Secretary of Agriculture buy by grade any grain, seed or other agricultural products that have been graded as provided by this act.

Section VIII. A state warehouse license must be obtained through the State Supervisor of Grades, Weights and Measures for

(1919 Act.)

or publicly owned warehouse, elevator or flour mill, provided, that such buyer or agent shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. The condition of such license shall require such Deputy Inspectors of Grades, Weights and Measures to fix grades and dockage of grain and seeds inspected at their respective places of business and correctly weigh the products so inspected and graded according to the provisions of this Act and the rules and regulations made hereunder. The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in soliciting or procuring consignments of grain, seeds or other agricultural products, providing that such solicitor shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. The condition of such license shall require such solicitor to comply with the provisions of this Act and all rules and regulations established by the State Inspector of Grades, Weights and Measures. The State Inspector of Grades, Weights and Measures may suspend or revoke any license issued by him under this Act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this Act or the rules and regulations made hereunder. All licenses issued under this section, unless revoked as herein provided, shall terminate on the 30th day of June each year. Licenses shall not be transferable without the consent of the State Inspector of Grades, Weights and Measures.

Sec. 12. The State Inspector of Grades, Weights and Measures shall collect a fee of $10.00 for each license issued under the pro-

(1922 Act.)

each and every public warehouse handling grain, seed or other farm products in the state. License fee for such warehouse to be fixed by the State Supervisor of Grades, Weights and Measures, and shall not exceed $1.00 for each 1,000 bushels capacity of such warehause. The license thus obtained shall be posted in a conspicuous place in such warehouse and shall expire on the 30th day of June each year following the issuance thereof.

Section IX. It shall be the duty of the Supervisor of Grades, Weights and Measures to inspect public warehouses handling grain, seed or other farm products and to establish and alter rules and regulations for handling, storing, weighing, grading and inspecting such farm products and he shall require the proprietor, lessee or manager of any such public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, who does not pay cash in advance for the grain so bought, to file with him a bond, running to the state, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash and in addition thereto, he shall require a bond from such public warehouse in a penal sum of not less than five thousand dollars, as in his discretion he may deem fit for the faithful performance of their duties as public warehousemen, and the compliance with all of the laws of this state in relation thereto.

(1919 Act.)

visions of Section Eleven of this Act.

Sec. 26. A state warehouse license must be obtained through the State Inspector of Grades, Weights and Measures for each and every public grain warehouse in operation in this state. No license issued under this article shall describe more than one warehouse or grant permission to operate any other warehouse than the one therein described. The license fee is hereby fixed at Eight Dollars for warehouses of a capacity of 12,000 bushels or less and Ten Dollars for warehouses of a capacity of over 12,000 bushels and not to exceed 25,000 bushels, and Twelve Dollars for all warehouses over 25,000 bushels and not to exceed 50,000 bushels, and Twenty Dollars for all warehouses over 50,000 bushles and not to exceed 80,000 bushels capacity for each public grain warehouse. Before issuing any such license, the State Inspector of Grades, Weights and Measures shall collect from the person applying therefor the license fee required herein.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(h) To inspect public warehouses and to establish, amend, and alter rules and regulations for handling, storing, weighing, grading and inspecting grain, seed and other agricultural products and for the management of public warehouses for the purpose of carrying out the provisions of this Act or any other law in this state in regard to the same, provided, that all such rules shall be published by the State Inspector of Grades, Weights and Measures in such manner as to give the greatest publicity thereof;

Sec. 22. The proprietor, lessee or manager of any public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, and who does not pay cash in advance for the grain so bought shall file with the State Inspector of Grades, Weights and Measures a bond, to the state with good and sufficient sureties, to be approved by the

(1922 Act.)

Section X. And it shall be the duty of every public warehouseman in this state to keep a record of the names and addresses of their respective warehouses, elevators or mills; the price paid for agricultural products, the grades given; the price received and the grades received at the terminal markets or within the state, which information shall be furnished to the Supervisor of Grades, Weights and Measures upon written request.

Section XI. In case of any dispute as to grades, weights or measures between the producer and the purchaser, operating a public warehouse, elevator or flour mill, handling agricultural products, then a sample shall be taken from such farm product, and shall be sent to the Supervisor of Grades, Weights and Measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.

Section XII. It shall be unlawful for any person to grade grain, seed or other agricultural products who has not been licensed by the Supervisor of Grades, Weights and Measures or who does not hold a license to grade, weigh or measure grain,

(1919 Act.)

Inspector of Grades, Weights and Measures in the penal sum of not less than Five Thousand Dollars nor more than Seventy-five Thousand Dollars, in the discretion of the State Inspector of Grades, Weights and Measures conditioned for the faithful performance of their duties as Public Warehousemen and the compliance with all the laws of this state in relation thereto. Only one bond need be given for any line of elevators, mills or warehouses owned, controlled or operated by one individual, firm or corporation. Such bond shall specify the location of such elevator, mill or warehouse operated by such individual, firm or corporation and shall be in an amount sufficinet to protect the holders of the outstanding grain tickets.

Sec. 20. It shall be the duty of all Deputy Inspectors of Grades, Weights and Measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades reecived at terminal markets or within the state. This information shall be furnished the State Inspector of Grades, Weights and Measures upon written demand thereof.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(e) To hear and determine appeals from the decision of State Deputy Inspectors and from Deputy Inspectors of Grades, Weights and Measures;

Sec. 19. The State Inspector of Grades, Weights and Measures shall receive, hear and determine all appeals from the decision of all State Deputy Inspectors and from all Deputy Inspectors. All such appeals shall be heard and determined by the State Inspector of Grades, Weights and Measures under such rules and regulations as he may establish therefor and he shall consider the flour and bread producing qualities of such

(1922 Act.)

seed or other agricultural products under the United States Grain Standards Act. And it shall be unlawful for any person or persons, corporation or association to operate a public warehouse, or to grade grain, seed or other agricultural products without first securing a license from the Supervisor of Grades, Weights and Measures, provided, however, that this section shall not prohibit any such person from buying such agricultural products if they have first been lawfully graded or provided he buys them by samples as otherwise provided for herein.

Section XIII. To accomplish the purpose of this act the State Supervisor of Grades, Weights and Measures may employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary, and he shall define the duties and designate the titles and fix the compensation and bonds of such persons so engaged, the total compensation of such appointees and employees, together with the other expenditures for the operation and maintenance of the Department of Grain Grading, shall remain within the appropriation and the funds received from the licensing of elevators, warehouses and mills handling agricultural products available each year for such purpose; and the Supervisor of Grades, Weights and Measures may remove any such deputies, assistants, accountants, expert agents and servants whenever in his judgment the public interests require it, and he may do any and all such other acts as are necessary to carry out any and all of the provisions of this act. And it shall be the duty of the Attorney General of the state and his assistants and all of the state's attorneys of the various counties of the state to prosecute any violations of any of the provisions of this act upon complaint made to them in writing by the State Supervisor of Grades, Weights and Measures.

Section XIV. The salary of the Supervisor of Grades, Weights and Measures shall be paid out of the

(1919 Act.)

grain where such final decision is necessary. It shall be the duty of Deputy Inspectors of Grades, Weights and Measures to post a copy of this section in a conspicuous place in their respective places of business and to call the same to the attention of all persons dissatisfied with any decision.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(g) To employ such deputies, experts, accountants, clerks and all other employees necessary to carry out the provisions of this Act with power to fix and determine the compensation and bonds of all such deputies, experts, accountants, clerks and other employees;

(1922 Act.)

grain grading fund, and he shall give bond to the state in the sum of ten thousand dollars.

Section XV. Any person who assaults or in any way resists any officer or employee of the North Dakota Grain Grading Department in the execution of his duties, or who violates any of the provisions of this act shall be guilty of a misdemeanor.

Section XVI. There is hereby appropriated for the purpose of carrying out the provisions of this act out of any of the general funds of the State Treasury the sum of ten thousand dollars, together with all moneys in the State Treasury known as the State Grain Grading Fund, and all fees for licenses collected under the provisions of this act shall be turned into the State Treasury and designated as the North Dakota Grain Grading Fund, and when so turned in and designated, it shall be appropriated and available for the purpose of carrying out all of the provisions of this act.

Section XVII. All of the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the Supervisor of Grades, Weights and Measures; and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed.

(1919 Act.)

Sec. 30. Any person who forcibly assaults, resists, impedes or interferes with the State Inspector of Grades, Weights and Measures or any employee of the State of North Dakota in the execution of any duties authorized to be performed by this Act, shall upon conviction thereof be fined not less than $50.00 nor more than $100.00 or be confined in the county jail not less than fifteen days or more than thirty days, or both such fine and imprisonment.

Sec. 31. All money in the State Treasury known as the State Grading and Weighing Fund are hereby appropriated for the purpose of carrying out the provisions of this Act, and shall be disbursed on vouchers issued by the State Inspector of Grades, Weights and Measures. All fees and licenses collected by the State Inspector of Grades, Weights and Measures shall be turned into the State Public Grain Grading and Weighing Fund, and the salaries and compensation of the State Inspector of Grades, Weights and Measures, Chief Deputy Inspector of Grades, Weights and Measures, Chief Elevator Accountant and all other Deputies, Inspectors, Accountants, Experts, clerks and employees, and all other expenses shall be paid out of this fund; provided such salaries, compensation and other expenses shall not exceed the sum of $35,000 per annum.

DEFINITION.—In the record, the terms "primary market" and "terminal market" are used in referring to the markets where grain is received by rail from many localities. In this brief, we refer to these markets as "terminal markets" and the elevators there located as "terminal elevators." The market to which the farmer hauls his grain is referred to in the record indiscriminately as the "local market," "farmers' market" and "country market." In this brief, we refer to this market as the "country market" and the elevators there located as "country elevators."

POINTS AND AUTHORITIES.

POINTS RELIED UPON.

We invite attention to the following propositions upon which we rely in contending that the initiated law of North Dakota, regulating the marketing and grading of grain, is invalid.

I.

The North Dakota statute of 1922 is a violation of the Commerce Clause of the Federal Constitution, in that it imposes a direct and unreasonable burden upon and interferes with the purchasing of North Dakota grain in interstate commerce.

1. The North Dakota statute of 1922 does not differ materially in its provisions and operation from the statute of 1919, held invalid by this court.

2. Section XVII of the statute of 1922 expressly adopts and must be held to authorize the doing of the very acts which were determined by this court to be obnoxious to the Federal Constitution.

II.

The statute of 1922 conflicts with the United States Grain Standards Act.

III.

The 1922 statute is in conflict with the Fourteenth Amendment of the Federal Constitution, in that it interferes with the right of individuals to make contracts and provides for the taking of property without due process of law.

I.

THE NORTH DAKOTA STATUTE OF 1922 IS A VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, IN THAT IT IMPOSES A DIRECT AND UNREASONABLE BURDEN UPON AND INTERFERES WITH THE PURCHASING OF NORTH DAKOTA GRAIN IN INTERSTATE COMMERCE.

COMMERCE IN NORTH DAKOTA GRAIN IS LARGELY INTERSTATE. —North Dakota produces more spring wheat than any other state in the Union. Its crop varies from one hundred million bushels to one hundred fifty-six million bushels annually. This great quantity of wheat when marketed moves largely to other states. Approximately ninety per cent of the wheat raised and sold in North Dakota is bought for shipment to and is actually shipped to the terminal markets outside of the State, principally to the Minnesota terminals at Minneapolis and Duluth. Only ten per cent is sold for use within the State of North Dakota. It thus appears that consumers throughout the United States are largely dependent upon the wheat grown in North Dakota for their supply of flour and other wheat products, and conversely the producers of wheat in North Dakota are largely dependent upon the demand in other states for a market for their grain.

This general situation has existed for many years and facilities have been developed in recognition of its existence and its permanency. Country elevators have been built connected with railroad tracks at all stations within the grain growing area throughout North Dakota by men and companies engaged in

handling this grain. Approximately twenty-two hundred such elevators are operated within the State of North Dakota. These elevators are of limited capacity and are used largely to facilitate the transferring of grain from the farmers' wagons, in which it is hauled to the local market, to railroad cars for shipment to the terminal markets beyond the State as rapidly as carload lots of one grade of grain are accumulated and cars for loading can be obtained. At the terminal markets terminal elevators of great capacity have necessarily been gradually built up to receive and hold this grain until it is milled or exported. The aggregate elevator capacity in Minneapolis is fifty-six million one hundred fifty thousand bushels, and at Duluth, thirty-six million three hundred twenty-five thousand bushels, making a total elevator capacity at the Minnesota terminals of ninety-two million four hundred seventy-five thousand bushels. Thus not only does this vast interstate commerce exist, but, in order to provide facilities for it, enormous permanent investments have been made and thousands of persons are actively engaged in carrying it on.

THE PRICE PAID FOR WHEAT IN NORTH DAKOTA IS BASED ON THE MINNESOTA TERMINAL MARKET PRICE.—This fact is known to sellers and cards showing such price basis are generally posted in North Dakota country elevators. The "Margin" referred to in the North Dakota Statute is the difference between the Minnesota terminal market price and the price paid at the country elevator in North Dakota less freight to the terminal market.

STANDARDS FOR GRADING GRAIN IN NORTH DAKOTA PRIOR TO THE ESTABLISHMENT OF THE FEDERAL AND NORTH DAKOTA STANDARDS.—Long prior to 1916 Minnesota had provided for the establishing of standard grades for grain known as "Minnesota Grades." The State Board of Grain Appeals annually, at the beginning of the crop movement season, established and published such grades to apply during the ensuing season. A Grain Inspection Department was created with a force of In-

spectors charged with the duty of grading grain. It had as well a State Grain Weighing Department. In the exercise of its police power over public elevators it required that all grain received in such elevators for storage be inspected and graded by a State Inspector and reinspected when it was delivered out of the elevators. Section 4442, General Laws of Minnesota, 1913, provides:

> "Inspection. All grain received at a terminal warehouse shall be inspected and graded by a State Inspector, and reinspected in like manner upon delivery from such warehouse. The charges for such inspection shall be paid by the warehouseman and added to the storage, and the Chief Inspector may recover such charges from the warehouseman"

This Minnesota Statute is similar to the Missouri Statute involved in *Merchants' Exchange v. Missouri,* 248 U. S. 365. Like Statutes exist in practically all the grain producing states and no longer is there any doubt as to their validity. The storage and handling of grain for others is a business affected with a public use and its regulation is within the police power of a state. Such Statutes are designed to protect the public from fraud and imposition.

Because the bulk of the North Dakota wheat moved to Minnesota and was sold at the Minneapolis and Duluth terminal markets according to Minnesota grades, naturally buyers of grain for the Minnesota terminals bought it in North Dakota according to these grades. This was the general practice although some buyers used "card grades" containing certain grades of wheat which were not official "Minnesota Grades." Of course, grain so bought was not actually inspected in North Dakota by a Minnesota Inspector, but the buyer and seller would agree that a quantity of wheat brought to a North Dakota elevator for sale was No. 1 or No. 2, or some other defined Minnesota grade, and would then agree to buy and sell at the price which was the going price for that grade of wheat.

BUT THE MINNESOTA STATUTE DID NOT APPLY TO THE BUSI-

NESS OF BUYING GRAIN AND DID NOT REQUIRE THAT ALL GRAIN BOUGHT AND SOLD IN THE STATE SHOULD BE FIRST GRADED OR THAT GRAIN MUST BE BOUGHT OR SOLD ACCORDING TO "MINNESOTA GRADES."—The State established and defined the grades and it furnished the facilities for making a State inspection at a prescribed fee. Naturally in order to make trading in grain exact and definite at the Minnesota terminals, grain buyers as well as elevator owners bought and sold grain as of a certain Minnesota grade, according to State inspection. Under such sales, if, on appeal, the grade was changed, a corresponding price adjustment could be made. In contracts for future delivery of grain, the Minnesota grade was adopted as affording an accurate and dependable description of the kind of grain to be delivered under the contract and the Minnesota inspection was adopted as final evidence of the grade. These grades and this inspection were not only recognized at Minnesota terminals, but generally in other terminal markets as well as in the country markets. *This general acceptance of Minnesota grades, however, was not under attempted compulsion of the Minnesota Statute.* The only Statute attempting to compel acceptance of local State grades to which our attention has been directed, other than the North Dakota Statutes, is a Wisconsin Statute, Chapter 19, Laws of Wisconsin 1905, as amended Chapter 12, p. 19, Sp. Sess. Laws 1905. This law was held invalid as an interference with interstate commerce in *Globe Elevator Co. v. Andrew,* 144 Fed. 871, affirmed 156 Fed. 664. The applicability of this decision to the North Dakota Statute, as well as the inapplicability of the decision on the Missouri Warehouse Statute will be discussed later.

STATUTES COMPELLING GRADING OF GRAIN BY LICENSED INSPECTORS AS A CONDITION OF ITS PURCHASE.

In 1913 Congress enacted the United States Grain Standards Act, being Part B of the Agriculture Appropriation Act of Au-

gust 11, 1916, Chapter 313. This Act authorized the Secretary of Agriculture to establish grain standards or grades. Pursuant to this authority, Service and Regulatory Announcement Number 33, promulgated April 13th, 1918, effective July 15th, 1918, established official grain standards for wheat and shelled corn and Announcement Number 46, promulgated March 15th, 1919, effective June 16th, 1919, established official grain standards for oats.

After the passage of the Federal act, the 1917 session of the North Dakota Legislature passed a grain grading and inspection statute. This statute was replaced by the 1919 statute held invalid in the Lemke cases above. The 1922 statute was then initiated and passed. These North Dakota statutes, like the United States Grain Standards Act, compel the grading of grain as a condition of its purchase.

THE FEDERAL ACT IS VALID AND PROPER LEGISLATION.

(a) It regulates and burdens interstate commerce, but this is within the authority of Congress.

(b) It established a uniform method of grading grain moving in interstate commerce, by adopting existing State Inspection Departments and making State inspectors Federal inspectors.

THE NORTH DAKOTA STATUTE IS NEITHER VALID NOR PROPER LEGISLATION.

(a) By making State grading a condition to buying grain in interstate commerce, it attempts a direct regulation and places a direct burden on interstate commerce. This is beyond the authority of the State.

(b) It destroys uniformity in grading grain by making grain buyers State inspectors. Under the Federal statute grain buyers cannot be federal inspectors.

THE NORTH DAKOTA STATUTE REQUIRES THE GRADING OF ALL GRAIN BOUGHT OR SHIPPED WITHIN THE STATE SUBJECT TO STATE SUPERVISION. THE BULK OF THIS GRAIN MOVES IN INTERSTATE COMMERCE. THE GRADING OF GRAIN MOVING IN INTERSTATE COMMERCE REQUIRES A UNIFORM RULE.

In *Globe Elevator Company v. Andrew,* 144 Fed. 871, a Wisconsin Statute requiring all grain sold at Superior, Wisconsin, to be sold according to Wisconsin grades was held invalid.

Superior, Wisconsin, an important lake port receiving large quantities of grain from railroads and shipping it out by boat, became dissatisfied with the customary buying and selling of grain on Minnesota weights and grades and desired the establishment and recognition of Wisconsin weights and grades. Reflecting this attitude of its important grain terminal, the Wisconsin Legislature created a Wisconsin Grain Weighing and Grading Department in 1905 (Laws of Wisconsin 1905, B-37, C-19, as amended by Laws Special Session 1905, B-19, C-12). This Statute *required grain bought and sold in Superior to be* weighed and inspected under the Wisconsin Statute *and prohibited any person from offering for sale or selling or delivering any grain in Superior under the Minnesota grading or under any other grading not provided in the Wisconsin Act.* The decision by the Circuit Court states:

> "The attempt of the Wisconsin statute to prescribe the standard of sale thus appears to be a regulation of commerce. It interferes with and attempts to destroy the grades on which the purchaser depends in making his purchase and succeeding sale.
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> It is also clear to me that so important a matter as fixing the grades by which grain in interstate transportation can be sold, and without which it cannot be sold on any large scale, admits of one uniform system or plan of regulation, and only one, and therefore falls within the exclusive power of Congress. Certainly it cannot readily be bought and sold according to two systems of inspection. It cannot be bought by one and sold by another. Conflict-

ing state systems would only obstruct. *State Freight Tax*, 15 Wall. 243, 27 L. Ed. 146; *Welton v. Missouri*, 91 U. S. 280, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 273, 23 L. Ed. 543. Like the regulation of tolls on an interstate bridge, the fixing of a standard of sale for grain, moving in interstate commerce admits of only one uniform system."

This decision which was affirmed by the Circuit Court of Appeals in 156 Fed. 664, contains an exhaustive discussion of interstate commerce in grain and a comprehensive review of the decisions relating to the police power of the State and the exclusive power of Congress to regulate acts constituting interstate commerce. The discussion and decision in the main are directly applicable to the North Dakota Statute and the questions here involved and the reasoning was adopted as directly applicable to the North Dakota Act of 1919 by the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635.

Grain moves in interstate commerce through many states. It retains substantially a uniform character and condition throughout the movement. It may be bought and re-sold several times before it reaches its final destination. It seems clear, therefore, that the grading of grain is a subject lending itself to and requiring one uniform regulation. Recognizing this situation, Congress in 1916 passed the United States Grain Standards Act which requires all grain sold or shipped in interstate commerce to be inspected by licensed Federal Inspectors and to be by them graded according to duly established Federal standards.

At the time the Globe Elevator case, *supra*, was decided, the Federal Grain Standards Act had not been passed and yet Judge Sanborn in that case, held that the attempt of the Wisconsin Statute to *compel* purchases in Wisconsin to be made according to Wisconsin inspectors' grades was an interference with and a burden upon the usual established course of interstate commerce.

Some plausible reason can always be assigned for a local

interference with interstate commerce, but if the evil in fact exists, it does not call for the exercise of a State regulation but for a Federal regulation. It is a matter requiring a uniform regulation. In matters within the exclusive jurisdiction of Congress it is for Congress to determine when and how the matter should be regulated. The absence of a regulation by Congress is a Federal determination that that regulation is not required. So it was said by Mr. Justice Field in *County of Mobile v. Kimball,* 102 U. S. 691, 697:

> "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. *Some of them are national in their character, and admit and require uniformity of regulation,* affecting alike all the states; others are local, or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities. *Of the former class may* be mentioned all that portion of commerce with foreign countries or between the states which consists in the *transportation, purchase, sale and exchange of commodities.* Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."

Much of the brief and argument in support of the state grain grading acts is devoted to claimed unfair practices surrounding the purchase of grain from producers in North Dakota. A short answer to this argument is that if such abuses exist, they exist in interstate commerce and should be remedied by Congress. This court clearly announced this as the proper remedy in *Lemke v. Farmers Grain Company of Embden,* 258 U. S. at

60-61. We do not desire to divert attention from the actual point involved in this case by engaging in a controversy about the conditions under which grain is marketed in North Dakota. However, the existence of more than two thousand country elevators, many of them farmers co-operative elevators—these latter making no profit from the purchase of grain from the farmers and marketing it at the terminal markets—and the resulting competition necessarily relieves the marketing of grain from those abuses which are apt to arise in business transactions where one side or the other has a monopoly.

The actual conditions surrounding the marketing of grain have repeatedly been announced by independent commissions and public officials, and the reports thus made present a very different picture from that given in the appellants' brief. The answer in this case (Record, p. 37, with diagrams upon the three preceding pages) shows the results of an investigation made by the Department of Agriculture in co-operation with the Federal Trade Commission of the actual grades given the 1917 grain crop in the states of Minnesota, North Dakota, South Dakota and Montana. From an inspection of this diagram it will appear that in each of these states, on the average grain purchased at country elevators was assigned a higher grade than was given the same grain at the terminal market. This evidences the fact well understood in the grain trade, that the sharp competition between elevator buyers at country points expresses itself in the giving of higher grades to grain than that grain is actually entitled to receive. The price paid for grain of a certain grade at a country marketing point is based on the price at that time of that grade of grain at the terminal market, and the price paid for that grade of grain by farmers' co-operative elevators, independent elevators and line elevators is necessarily uniform and is shown on cards posted generally in the elevators, but manifestly the grade to be given to a particular lot of grain depends upon the judgment or desire to buy of each buyer. This results in higher grades being

given by the buyers than the same grain will receive upon Federal inspection at the terminal points. This higher grade, of course, results in a correspondingly higher price to the farmer.

The same situation was disclosed by an investigation made by the Federal Trade Commission immediately prior to September 15, 1920, and is stated in the Report of the Federal Trade Commission on the Grain Trade, Vol. 1, dated September 15, 1920. At page 202 it is stated:

> "As shown by the table, however, the grand total loss on grading, weighing and docking combined amounted to $83,337.22, or a loss of 0.35 of a cent per bushel."

As shown by the context, the term "loss" is applied to the loss in grade, dockage and weight of the grain dealer buying grain at country points and selling it at the terminal markets under State or Federal inspection.

The situation as disclosed by these reports leaves as the only ground of complaint of the farmer the claim that the North Dakota grain crop is sold at an inadequate price, and this is a widespread belief among farmers. The recent co-operative pooling movements represent an attempt, whether wise or unwise, to remedy that situation by placing the farmer in a position to "name his own price for his commodity." The legislation under consideration of the State of North Dakota represents, so far as we are informed, the only effort of the State as a political unit to bring about, wholly or partially, this price control by regulating and establishing the conditions under which the grain crop of the State shall move out of the State in interstate commerce.

It is continually suggested by the State that if, in fact, there is at present no imposition on the farmers in the purchasing of grain, it follows that no hardship can result to buyers of grain from the enforcement of the North Dakota statute. This suggestion, of course, does not meet the point that the State has not the right to directly interfere with interstate commerce. But it was the arbitrary enforcement of the statute of 1919 and

the rules and regulations thereunder, as well as the imposition of burdens by the State, that gave cause for continual complaint on the part of grain buyers. They believed that the law was passed and enforced as a partisan political measure; that under it continual discrimination was practiced; and they likewise believed that the 1922 Act was initiated and passed as a partisan political propaganda, and that the grain supervisor thereunder would arbitrarily enforce the powers conferred upon him by the statute unfairly to the grain buyers. Under the terms of the Act the Supervisor may at any time require grain to be graded above its true grade. He may at any times require payment for dockage according to his idea of its value, although the buyer and seller, when the grain was delivered and the purchase price paid, had agreed on its true value. Margins called reasonable by the Supervisor may be so small as to entail a loss in buying grain. He continually controls the buyer by the threat of the revocation of his inspection license whenever in a dispute the Supervisor takes the side of the elector farmer seller. In addition, the imposition of excessive license fees, and the requirement of bonds, all burden the persons seeking to buy grain in interstate commerce. This statute is designed to and will, if put in operation, prevent the free purchase of North Dakota grain and obstruct its free movement in interstate commerce.

THE DECLARED PURPOSE OF THE NORTH DAKOTA STATUTE.—The 1922 statute, regardless of the long established movement of grain in interstate commerce and alike of the decision of this court upon the former statute, authorizes the State officials of North Dakota to investigate and supervise the marketing of this grain. The statute in its recital boldly declares "the purpose of the State of North Dakota to supervise and regulate the marketing of farm products," defines the scope and manner of such supervision and the powers and duties of the persons charged with same; provides for licensing buyers as inspectors. This purpose is carried out by placing the whole machinery for

marketing the grain crop of North Dakota under the supervision and control of State officials.

BUYERS MUST BE LICENSED AS INSPECTORS.—This necessarily results from the provision of the statute (Section V), that no person shall buy grain unless it shall have been inspected and graded by an inspector licensed under the provisions of the Act or under the provisions of the United States Grain Standards Act. No Federal inspectors are at country elevators for the reason that the buyers cannot be made Federal inspectors, and no provision is made by the State for disinterested inspectors who could obtain Federal licenses. So the practical effect is that all grain must be graded under the provisions of the State Act and under the direction of the State Supervisor by buyers licensed as inspectors. This is recognized by the provision in Section VI requiring the State Supervisor of Grades, Weights and Measures to issue a license to grade to any person engaged in buying grain. The practical situation is also clearly recognized in the preamble to the Act referred to above "providing for *licensing buyers,* solicitors and warehouses *handling such farm products.*" The permission in Section V to buy grain by sample has no practical significance. Grain is not bought by sample at country points. There can be no question that the result of this statute is to require that at all the twenty-two hundred elevators in North Dakota in order to buy grain the buyers must receive from the State Supervisor a license to grade grain and also a license for the operation of the elevator.

LICENSE FEES.—The 1922 Act does not require in terms a fee for a license as an inspector, but as the buyer licensed as an inspector is the elevator operator, it accomplishes the result by placing an excessive fee for a license for the operation of the elevator and providing that these license fees shall go into a fund from which shall be paid the expense of the State grain inspection and grading. Thus it clearly appears that the elevator license fee is not for the purpose of inspection of warehouses, but it includes an amount of money for the supervision

of grading, and this in its final analysis is a payment for the privilege of buying grain in interstate commerce. In construing the law, its practical operation must be considered, and, considering it in this manner, the license provisions are a clear and direct burden on interstate commerce.

It has repeatedly been held that a state cannot require a license as a condition to engaging in interstate commerce.

Robbins v. Shelby Taxing District, 120 U. S. 489.

Brennan v. Titusville, 153 U. S. 289.

Lemke v. Farmers Elevator Co., 258 U. S. 50.

REVOCATION OF LICENSES.—The State Supervisor may revoke the license of an inspector. Thereby he necessarily withdraws from the buyer the right to buy grain, because as a practical matter the buyer cannot buy grain until it is graded, and there is no other existing method for the grading of the grain except through the license held by the buyer. Such a revocation, in effect, not only prevents the buyer from buying grain, but it closes the elevator devoted to the business of handling purchased grain. It is true some grain is stored in elevators, but practically all such storage is temporary and the grain is ultimately purchased by the buyer. By special contract the wheat growers pool uses certain elevators for the storage of its grain and the transfer of the same to cars for shipment to the terminal market. This special arrangement, however, does not affect the general course of business at the great majority of the elevators. (Section VII of statute.)

MARGINS.—The State Supervisor, among other things, is required to exercise his power to prevent unreasonable margins of profit. (Section IV of statute.) The "margin" is the spread between the price paid at the country elevator and the price at the terminal market. The margin thus fixes the price at which the grain is bought at the country elevator. The Supervisor can, through his control of licenses essential to the buying of grain, dictate the margin and the resulting price to be paid by the buyer for wheat.

DOCKAGE.—This controlled buyer is not permitted to *retain* dockage without a payment therefor satisfactory to the Supervisor. Section IV of the statute provides:

> "The value of dockage shall be considered and the buyer shall not be permitted to *retain* same without just compensation. He shall pay the fair market value for same or *separate it and return it* to the producer."

This provision, as the identical provision was construed in the former statute by the State Supervisor, means that at any time after grain has been bought and received and paid for at a price agreed upon between buyer and seller, the State Supervisor may either with or without complaint of the seller require the buyer to pay to the seller an additional amount as specific payment for such dockage. While the buyer might resist the order, as a practical result, in order to avoid interruption of his business, he would make the payment, no matter how unreasonable it was.

The alternative provision that the buyer must return dockage to the seller is even more arbitrary and interferes to an even greater extent with the right to freely engage in interstate commerce in North Dakota grain. This seems too apparent for argument. The only conceivable means of separating the dockage from the grain is by means of expensive cleaning apparatus and machinery. In order to take advantage of this alternative, the buyer must install in his elevator this expensive apparatus. To impose this obligation on the buyer involves a direct and very substantial burden on his interstate business. Furthermore the screening of grain, particularly during the busy season, slows down the handling of grain through the elevator and interferes with its proper and advantageous use by the owner.

No analogy can be drawn between a law requiring a person buying grain in interstate commerce to screen it as a part of the very transaction of purchase and a law requiring the owner of a coal mine to screen coal before weighing the same. The entire process of mining coal is subject to the police power of the

state in which it is carried on. It is subject to regulation under this power even though it be a direct and burdensome interference with the operation. It has never been questioned but that the state can regulate the mining of coal within its borders. It can not, however, directly regulate or burden any transaction which is a part of interstate commerce in grain, even though that transaction takes place within its borders.

GRADING OF GRAIN AS PROVIDED FOR IN THE 1922 STATUTE IS AN INTEGRAL PART OF THE PURCHASE OF THAT GRAIN AND HENCE AN INTEGRAL PART OF INTERSTATE COMMERCE.

That the purchase of grain for movement beyond the state in the manner in which it is purchased by the appellees in this case is an integral part of the interstate commerce in that grain is no longer open to question.

Lemke v. Farmers Elevator Company of Embden, 258 U. S. 50.

Stafford v. Wallace, 258 U. S. 495 at 519.

Pennsylvania v. West Virginia, 262 U. S. 553 at 597.

United Leather W. I. U. v. Herkert & Meisel Trunk Co., 284 Fed. 446, 450 (C. C. A., 8th Circuit, Opinion Judge Sanborn).

Forced to concede, by these decisions, that the purchase of grain in North Dakota is a part of interstate commerce and cannot be directly controlled by the State of North Dakota, counsel for the State now strenuously contend that the grading, which is alleged to precede the purchase, is not a part of the complete interstate commerce transaction, and in support of this claim use the identical arguments advanced in the former case to support the claim then made that the purchase of grain preceded the interstate commerce transaction, and counsel very naturally drift from the argument that grading is not a part of the interstate commerce movement to a repetition of their original argument that the sale, preceding, as it does,

transportation, should not be held to be a part of interstate commerce. See appellants' brief, pages 42 to 48. The manifest difficulty with the State's position is that they are attempting to segregate different elements of the single unit of interstate commerce, when, in effect, they are so related to the completed interstate commerce transaction that they cannot be segregated.

In other portions of the brief, and in the answer of the State, the inclusion of grading in the purchase is shown (Record, p. 25). The State's answer contains this allegation:

> "That the *price* of said grain either for storage or sale *is wholly fixed by such grade* and inspection, and any and all returns or remuneration which the said farmer producer may receive for his sole product *depends necessarily upon the grade and inspection given to such grain by such buyer.*"

Under the existing conditions of buying grain in North Dakota, as well as under the provisions of the 1922 Act, the grading is an incident in and a part of the purchase. The grade assigned the grain determines the price. The buyer offers to give the grain a certain grade and thereby offers the local price for that grade of grain. If no agreement is arrived at as to grade and resulting price, then the offered grade is rejected by the seller, just as well as the price. If one buyer who offers a grade and price for a farmer's grain does not succeed in purchasing it, the grain is taken to another buyer who names the grade he will allow on the grain. The grain is not given a grade until a purchase is made. The acceptance by the seller of the buyer's offer alike complete the purchase and the establishment of the grade.

This is not only the actual method of buying grain, but it is the method recognized by the North Dakota Grain Grading Acts. The buyers are licensed as inspectors so that they may grade as a part of their purchase. The buyers are not authorized to establish grades independently of a purchase or of receiving the grain for storage.

Manifestly the grading of grain under the statute of North Dakota has no relationship whatever to grading grain under Federal inspection. Federal inspectors cannot, under the Federal statute, participate in any way in the purchase of the grain. The inspection and the buying are made wholly separate transactions under the Federal statute. Under the North Dakota statute and the North Dakota practice, they are a single transaction.

The fact that some grain is graded and stored and not immediately sold does not affect the question here involved. The 1922 act throughout places its limitation on the buying of grain. If the limitation is invalid as applied to buying, it does not help the statute or affect the question of invalidity to say that the statute would not be invalid if it related solely to the storage of grain, just as the statute would not be invalid if it related solely to grain that did not move in interstate commerce.

THUS THE STATE CARRIES OUT ITS DECLARED PURPOSE TO SUPERVISE AND REGULATE THE MARKETING OF ITS WHEAT CROP —TO SUPERVISE AND REGULATE INTERSTATE COMMERCE.—It is an effective, practical State regulation and control under existing conditions of buying grain in interstate commerce in North Dakota, and it prevents the persons seeking to buy that grain from freely engaging in interstate commerce and places a direct burden and restriction upon that commerce.

Before the adoption of the Federal Constitution, each state regulated all trading in commodities that might be found within its borders. The result is a matter of history. There was no authority which had the power to regulate entire transactions in which more than one state was involved. To supply this authority, the Interstate Commerce Clause was placed in the Federal Constitution. If North Dakota can supervise and regulate, through a systematized control of the marketing machinery, the sale of its chief product in interstate commerce, Minnesota and Michigan may do the same as to their iron,

Pennsylvania and West Virginia as to their coal, the southern states as to their cotton. The free flow of interstate commerce would thereby be interfered with and in fact wholly destroyed.

THE EXISTENCE OF A STATE POWER TO REGULATE PUBLIC WAREHOUSES DOES NOT IN ANY DEGREE TEND TO ESTABLISH A STATE POWER TO DIRECTLY REGULATE AND CONTROL THE MARKETING OF GRAIN IN INTERSTATE COMMERCE.

The State cannot under any guise impose a *direct* burden on or *control* interstate commerce or *fetter by conditions the right of individuals or corporations to carry on such commerce within the state.*

But beyond this, until Congress acts, the state may exercise within its borders its inherent power *although interstate commerce may thereby be indirectly affected.* These principles were applied and their applications distinguished in the two leading cases of

Munn v. Illinois, 94 U. S. 113.

Wabash, etc., Railway Company v. Illinois, 118 U. S. 557.

In the Munn case it was established:

Grain warehouses are devoted to a public use and are therefore subject to public control. They may be incidentally connected with interstate commerce but not necessarily so. They lend themselves properly to local regulation. Until Congress acts, the state in which a warehouse is located may exercise its governmental powers over it even though it thereby indirectly affects interstate commerce.

In the Wabash case the court definitely determined:

That the state power of regulations referred to in the Munn case did not extend to acts constituting an integral part of interstate commerce itself, or to those subjects related to interstate commerce requiring uniform regulation. The court refused to sustain under the rule of the Munn case a state regulation which affected charges for interstate transportation.

In the Wabash case this rule laid down in *Hall v. De Cuir*, 95 U. S. 485, is quoted and approved of:

> "But we think it may safely be said that state regulation which seeks to impose a direct burden on interstate commerce or interfere directly with its freedom does encroach on the exclusive power of Congress."

The distinction thus drawn has never been questioned or modified by the Federal courts. Following *Munn v. Illinois*, different state regulations of public warehouses were sustained in

Budd v. New York, 143 U. S. 517.
Brass v. Stoeser, 153 U. S. 391.
Cargill v. Minnesota, 180 U. S. 452.
Merchants Exchange v. Missouri, 248 U. S. 365.

In all of these cases the question involved was the right of the state to regulate the conduct of public warehouses located within the state. In *Cargill v. Minnesota*, the state requirement of a license for a public warehouse was only sustained because:

> *"The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased.* The license has reference only to the business of the defendant at its elevator and warehouse." (Italics ours.)

Notwithstanding the clear force and effect of the decision of the Supreme Court in *Cargill v. Minnesota*, counsel for the State in their brief discuss at great length the provisions of the statute considered in that case in an effort to show that the statute there construed did, in fact, restrain the buying of grain moving in interstate commerce. We suggest that counsel cannot alter the announced force and effect of the decision of this court in the *Cargill v. Minnesota* case.

Brass v. Stoeser sustained a North Dakota statute requiring public warehouses to receive grain for storage at the rates established by the statute. *North Dakota still has this statute.*

The validity of this statute establishing a complete regulation of public warehouses is not here questioned. The statute of which we complain attempts an exercise of state power involving an entirely different subject. It regulates the *buying* of grain. It does the very thing, the absence of which is referred to in the Cargill case as sustaining the validity of the Minne- State statute regulating and controlling the marketing of grain sustainable under the rule of the Munn and Brass cases. The state statute regulating and controlling the marketing of grain is wholly independent of any warehouse regulation and is invalid within the rule of the Wabash case. The rule applicable to the North Dakota statute regulating the marketing of North Dakota grain is the rule that the State cannot under any guise impose a direct burden on or control interstate commerce or fetter by conditions the right of individuals or corporations to carry on such commerce within the State. The two rules, with the distinguishing conditions, are clearly stated in the *Minnesota Rate Cases,* 230 U. S. 352, at 398, 399, 400, as follows:

> "The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden,* 9 Wheat. 1, 196.
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> * * * * * * * * * *
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> "It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.
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> * * * * * * * * * *
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> "The principle, which determines this classification, underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature

should be under the control of one authority and be free from restrictions save as it is governed in the manner that the national legislature constitutionally ordains."

The distinction between the two lines of cases was clearly pointed out in the Lemke cases, both in the decision in the Circuit Court of Appeals and in this court. Notwithstanding this, counsel for the State still urge that the cases upholding the warehouse statutes are authority for their position here, and they especially rely on *Merchants Exchange v. Missouri,* 248 U. S. 365. In *Lemke v. Farmers Grain Company of Embden,* 258 U. S. 50, at page 60, it is stated in reference to that case:

"The act there in question did not undertake to regulate the buying of grain in interstate commerce, nor to levy a license tax upon the privilege, nor to fix the profit which could be realized on grain bought, shipped and sold in interstate commerce."

Or as it was succinctly put by the Circuit Court of Appeals in the same case:

"The existence of a state power to regulate public warehouses does not establish a state power to directly regulate and control the marketing of grain in interstate commerce, and authorities in support of the power to regulate warehouses are not in point."

Farmers Grain Co. of Embden v. Langer, 273 Fed. —.

I-1. THE NORTH DAKOTA STATUTE OF 1922 DOES NOT DIFFER MATERIALLY IN ITS PROVISIONS AND OPERATION FROM THE STATUTE OF 1919 HELD INVALID BY THIS COURT.

At page 56, 258 U. S., this court stated of the 1919 Act in the Lemke case:

"This act shows a comprehensive scheme to regulate the buying of grain."

The preamble of the 1922 Act states:

"An Act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products."

Certainly in their general scope and purpose, the two acts are identical. Prior to the passage of the old Act, the complaint was made that grain was undergraded and underpriced. On page 12 of the appellants' brief, in discussing the 1922 Act, it is stated:

> "In view of the importance of the grain business and the vital dependence thereon by the entire state, and in view of the further fact that the returns to the great majority of residents of North Dakota is specifically fixed by the *price* obtained for their grain, and that the price for the grain is necessarily almost wholly determined from the grade given such grain, the vital importance of the *grading* of the grain becomes at once manifest."

We concur fully in this statement. The vital thing to the farmers of North Dakota is that they obtain an adequate price for their grain, and it was to secure this adequate price that both statutes were enacted, and under both statutes this result is sought to be obtained by a regulatory power and control over the machinery under which the grain crop is bought and sold.

LICENSE TO BUYERS AS INSPECTORS. UNDER BOTH ACTS THE CONTEMPLATED AND NECESSARY RESULT IS THAT ALL BUYERS OF GRAIN WILL BE LICENSED AS INSPECTORS.

It is true that under the 1919 Act the buyers were licensed both as buyers and inspectors, but this is clearly a distinction in terms without any practical distinction or change in purpose or effect. The duty under both Acts is to inspect and grade. Again counsel for appellants are forced to practically concede this at page 10 of their brief in this case:

> "It is plain that the first of the foregoing propositions is the vital proposition, because if the person desiring to *buy* grain, be licensed to *grade* grain, no difficulty can be experienced in complying with the second provision, to-wit, that grain not officially graded, cannot be purchased by grade."

The buying and grading of grain is one transaction. The buyer grades the grain. The license to him to grade is the

equivalent of license to him to buy. There is no such thing under the statute of North Dakota as the business of grading grain. It is not a business. The business is buying grain. For the grading no fees are paid. The grading is a mere inseparable incident to the buying. Counsel for appellants undertake to point out differences between the two Acts. This clearly nominal difference is the one they first refer to (p. 11, Appellants' Brief).

A STATE LICENSE IS REQUIRED UNDER THE ACTUAL AND ONLY POSSIBLE CONDITIONS OF PURCHASING GRAIN.—While the 1922 Act provides that grain may be graded by inspectors holding either a State or Federal license, admittedly there are no Federal inspectors at country elevators. Buyers cannot be appointed Federal inspectors. This situation is also recognized by the answer interposed by the State. At page 24 of the record, Section IV, it is stated:

> "This grading and inspection is supposed to be done in accordance with grades fixed under the United States Grain Standards Act *by the buyer in charge of the elevator,* and he is the only person ordinarily available with sufficient information and knowledge of grain to properly grade and inspect the same, *and the grading and inspection of practically all grain is wholly dependent upon such buyer.*"

Under the 1922 Act, as well as under the 1919 Act, the inspection of grain will necessarily be wholly dependent upon the grain buyer. The 1922 Act *requires* the State Supervisor to name all buyers as inspectors, upon condition that they pass a satisfactory examination. This is the second claimed difference between the two Acts pointed out by counsel for appellants.

Another nominal difference between the two Acts relied upon by the state (page 11 of their brief) is that:

> "Under the old Act grain buyers were made deputy state inspectors, while under the new Act *they are simply required to hold a license.*"

Such an unfounded claim of a difference requires no discus-

sion. The interesting thing in the claim, however, is that again the State understands and concedes that *"grain buyers" are "required to hold a license."*

THE ADOPTION OF THE FEDERAL STANDARDS NOT A MATERIAL CHANGE IN THE TWO ACTS.—While under the old Act the State Inspector was authorized to establish grades, he in fact had adopted as the grades of North Dakota the Federal grades. This was the situation before any action was brought to test the validity of the statute. The course being open to the State Inspector to adopt the Federal standards, and he having done so, no invalidity of the State Act could be predicated on a possible difference in standards, and this court did not so hold or attach importance to that possibility. Therefore, the situation is not different under the two Acts. As we have discussed elsewhere, the standards are but names—designations of different classes. The actual important thing is the determination of what class shall apply to a particular sample of grain. This is where the actual supervision and control of grades arises. The inspector determines the grade of a particular sample of grain. The inspection and classification of the grain is the only matter of importance. The name merely describes the classification after it has been adopted by the inspector.

UNDER THE NEW ACT, LIKE THE OLD, THE STATE SUPERVISOR AND THE STATE RULES AND REGULATIONS CONTROL THE STATE INSPECTORS IN DETERMINING THE GRADE OF GRAIN.—Section VI the Act expressly provides that the inspector shall inspect and grade grain "according to the provisions of this Act and the rules and regulations made hereunder." Section XI provides:

> "In case of any dispute as to grades between the producer and the purchaser operating a public warehouse, a sample shall be taken and shall be *sent to the Supervisor of Grades,* and the proper grade shall be determined by him *under such rules and regulations as he may establish.*"

There is in the State law no adoption of the rules of the Fed-

eral Inspection Department. Section VI of the new Act simply provides that if Federal standards are established, those standards shall become the grades and standards of the State.

Again, counsel for the State are wholly unwarranted in making the claim, as they do in their brief at page 11, that under the new State Act the rules and regulations for grading grain established by the State are subordinate to the Federal rules and regulations.

The State Supervisor appoints the State inspectors. He may revoke their licenses. They are bound to grade grain under the rules established by the State. In case of dispute, the appeal is to the State Supervisor and he determines the grade according to the rules established by him. There is no method by which an appeal may be taken to the Secretary of Agriculture. The entire machinery for classifying grain and determining its quality is under the absolute jurisdiction and control of the State Supervisor and the buyers of grain licensed by him as inspectors cannot, under the terms of the Federal Act, be Federal inspectors.

LICENSE FEE. THERE IS NO MATERIAL DIFFERENCE BETWEEN THE TWO ACTS AS TO LICENSE FEES.—The new Act has manifestly attempted to escape the charge that a license was imposed for buying grain, criticized by the decision of this court. This feeble attempt is the only recognition in the new Act of the decision of this court in the Lemke case, and this recognition is sought by a palpable, attempted evasion of the decision, rather than by the slightest conformity in principle to it. The fact appears (Record, p. 49) and is not disputed, that the average capacity of country elevators in North Dakota is approximately 30,000 bushels. Section VIII of the 1922 Act provides for a license fee for elevators to be fixed by the State Supervisor of Grades at not to exceed One Dollar for each 1,000 bushels capacity of such warehouse. Thus the average permitted license fee is Thirty Dollars per elevator per year. This money so raised is the only annual fund provided by the Act for the

payment of the expenses of the State Grading and Inspection Department. (See Section XVI of the Act.)

Heretofore, under existing statutes of North Dakota, an average fee of Six Dollars per year for each elevator has provided ample funds for the administration of the rules and regulations covering the operation of warehouses. The difference between Six Dollars a year and Thirty Dollars a year, or Twenty-four Dollars, represents a sum raised from elevator owners for no other purpose than the maintenance of the State Inspection and Grading Department of North Dakota. As heretofore stated, the buyers operate the elevators, which are used in connection with the buying of grain and furnish the only practical facility for receiving grain purchased and forwarding it to a terminal market. It is the buyers who must pay this fee.

Under the 1919 Act, a Ten Dollar annual license fee was paid by licensed buyers of grain, which annual license fee was turned in to the State Public Grain Grading and Weighing Fund, the same fund into which the warehouse license fee is paid under the new Act. Under the new Act, Twenty-four Dollars is extorted from buyers of grain instead of Ten Dollars as under the old Act, for the benefit of the same identical fund to be used for the same purpose. The burden on buying grain in interstate commerce in North Dakota is therefore increased more than two-fold by the new Act over the burden imposed by the old Act. In the State's brief (p. 27) it is stated that the average elevator capacity is only 2,500 bushels. Even so, the actual buyer's fee under the new law is practically double what it was under the old law.

MARGINS.—The new Act contemplates that the State Supervisor, like the State Inspector under the old Act, should regulate and control the margins at which grain is bought, and this purpose and plan to control margins is apparent even without reference to Section XXVII of the new Act. The new Act di-

rects the Supervisor to "supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit and confiscation of valuable dockage." This supervision is directly over the buyers of grain licensed as inspectors by the State Supervisor. Manifestly the electors of the State, interested, as they are, primarily in the price of grain, used this language in the Act in no meaningless sense. They intended the supervision to be actual and intended that the desired result—the prevention of what the State officials and farmers deemed unreasonable margins—should be accomplished. We submit that no other construction can be fairly given to this language in the light of the declared purpose of the act to "regulate the marketing" of farm products.

"Supervise" means a superior inspection, "to inspect with authority." It goes beyond a mere investigation. "Regulate" involves adjustment or control by rule. Both power to regulate and to supervise involve authority to direct and control. No other meaning can fairly be given them in this statute. These words are continually construed in statutes as conferring broad powers of control. Almost the only limitation on the power thus conferred is that the act to be regulated or supervised cannot be prohibited. The extensive power over interstate commerce exercised by Congress is conferred by the authority to "regulate" that commerce.

THE BOND REQUIRED FOR PURCHASING GRAIN EXCEPT UPON CASH PAYMENT THEREFOR.—The new law, like the old law, requires a bond for the faithful performance of the duties of public warehousemen. The new law, unlike the old, requires a separate bond from anyone buying or shipping grain for profit, who does not pay cash in advance for the grain so bought, such bond to be in an amount sufficient to cover the value of all farm products bought and not paid for in cash. It will be noted that this requirement is not limited to those who buy grain from farmers. It applies to anyone buying and shipping grain for profit in the State from any person.

It is a matter of general knowledge that grain is frequently bought to be paid for upon arrival at the terminal market. Sometimes a draft is attached to the bill of lading, sometimes not. Frequently grain is bought and sold on open account. At times, because of advances made to the country shipper, the balance of the account is against the seller. At other times, through the application of grain shipped, the balance is in favor of the purchaser. To require the buyer of grain to give bond sufficient to cover credits voluntarily extended by the sellers of grain is a direct, burdensome interference with the right of contract and with the right to freely purchase grain in interstate commerce.

In the defense of this provision of the new statute, counsel for the appellants state at page 30 of their brief that the court below modified the interlocutory injunction to permit the taking of bonds under Section IX of the 1922 Act. It is unfortunate that counsel has not more accurately set out the force of this order. It appears on page 21 of the record that it was made pursuant to a stipulation appearing on page 20. Neither the stipulation nor the order confers any authority upon the "Supervisor." Neither in the stipulation nor the order is any authority given to require the bond here complained of required from purchasers of grain on credit. Both the order and stipulation give authority to "the proper officials of the State of North Dakota * * * to require new bonds or additional bonds of warehouses and elevators in the State of North Dakota wherever and whenever in the judgment of such officials and the defendants herein, it may be necessary in order to adequately protect storage ticket holders in the State of North Dakota." This clearly refers to the penal bond to protect storage tickets required not only by the Warehouse Act of North Dakota, but by the Warehouse Acts of all wheat producing states. This is the penal bond required alike by the new and old Grain Grading Acts of North Dakota, of which the appellees could not fairly and do not complain. Manifestly the statement of coun-

sel in reference to the modification of this order of the court is wholly misleading and unfounded.

We invite the attention of the court to the provisions of these two Acts as shown in parallel columns in this brief. From such an examination it will clearly appear that the changes in the new Act, as compared with the old, are merely changes in terms. With the single exception of omitting a specific license fee for buyers, the changes do not even show an attempt to remove the objectional features of the old Act or to conform to the decision of this court in the Lemke case. The changes rather indicate an effort to shorten the Act and make it more appropriate for submission to the electors.

Upon the important point of "margins," it will be noted, for instance, that the duties of the State Inspector under the old Act were elaborately set forth in the various subdivisions of Section 2. Among them he was authorized to conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing of grain, and to establish a reasonable margin to be paid producers. Under the 1922 Act these two duties are consolidated in the provision of Section IV authorizing the Supervisor to investigate and supervise the marketing of grain, with a view of preventing unreasonable margins of profit. In fact, every duty imposed on the State Inspector by Section 2 of the 1919 Act is referred to in the 1922 Act, although in much briefer language.

We submit that, irrespective of the effect of Section XVII, in no respects is the new law less of an interference with and burden upon interstate commerce than was the old law, while in the respects of requiring a bond to purchase grain on credit and increasing the license fee required in order to engage in the business of buying grain in interstate commerce, the new law places added burdens upon that commerce.

I-2. SECTION XVII OF THE STATUTE OF 1922 EXPRESSLY ADOPTS AND MUST BE HELD TO AUTHORIZE THE DOING OF THE VERY ACTS WHICH WERE DETERMINED BY THIS COURT TO BE OBNOXIOUS TO THE FEDERAL CONSTITUTION.

The 1922 Act announces the purpose of the State to regulate the marketing of farm products. In Section IV it generally defines the manner in which this regulation shall be carried out, mentioning all the subjects of regulation which were mentioned in the old Act. It then provides in Section XVII that:

> "All of the duties and obligations which were *formerly performed* by the State Inspector of Grades, Weights and Measures and all of the obligations *placed upon him by law* are hereby transferred and made a part of the duties of the Supervisor of Grades, Weights and Measures."

We submit that this language carries its own interpretation and makes its own argument in support of our position—that it applies to every duty *formerly performed* by the Inspector under the old law, including the duty announced in subdivision (i), Section 2 of the 1919 Act:

> "To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills,"

and in Section 23 of the 1919 Act:

> "The State Inspector of Grades, Weights and Measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products."

Section XVII of the new law clearly takes cognizance of the fact that the State Inspector of Grades is no longer functioning as such, for it refers to the duties and obligations which *were formerly performed* by him. This clearly refers to his acts. He did, in fact, formerly fix margins. Those margins were in force and were complied with for a long period of time.

The new law requires the Supervisor to assume the duties *"formerly performed"* by the State Inspector. There is no basis for the suggestion that some of the duties *formerly performed* by the Inspector are not included in the duties transferred to the Supervisor under the new law.

Counsel for the State, realizing the necessity of giving Section XVII some effect, concedes that it transfers to the Supervisor the duties conferred on the Inspector by Chapter 241 of the Laws of 1919. Chapter 241 is an Act providing that the State Inspector of Grades, Weights and Measures shall be the "Inspector and Sealer of Weights and Measures." The Act then provides in detail the powers and duties of the Inspector of Weights and Measures. Thus Chapter 241 creates a new office—that of the Sealer of Weights and Measures—and confers upon the Inspector of Grades, Weights and Measures the powers and duties of this new office. It thus gives to one individual two official positions under distinct names. It is rather a forced construction of Section XVII to hold that by conferring on the Supervisor the duties of the State Inspector of Grades, Weights and Measures, thereby it confers on the Supervisor the office and duties of the Inspector and Sealer of Weights and Measures. Assuming, however, that Section XVII does have this force and effect, we cannot infer that that was the only intended force and effect of Section XVII. If that had been the intention, undoubtedly Section XVII would have conferred on the Supervisor not the duties of the Inspector of Grades, Weights and Measures, but the duties of the Inspector and Sealer of Weights and Measures.

Section XVII of the 1922 Act by its wording seems to refer to two groups of duties: The first, duties formerly performed by the Inspector. This aptly describes duties performed by the Inspector formerly under the Grain Grading Act of 1919. The second, obligations placed upon him by law. This would aptly describe duties now being performed by the Inspector under existing laws.

Section XVII confers on the Supervisor duties formerly performed by the Inspector of Grades, Weights and Measures. The Grain Grading Act of 1919 created the office of Inspector of Grades, Weights and Measures. It prescribed his duties and obligations in connection with that office. We submit it would be a forced construction of Section XVII to hold that its reference to duties formerly performed by this Inspector was not to the duties performed by him under the Act which created his title of Inspector and defined his many duties as Inspector.

The argument by the State that Section XVII should not be so construed because the Act of 1919 had been held invalid simply begs the question. Section XVII must be construed in connection with the other sections of the 1922 statute according to its terms and manifest meaning. It is part of a statute regulating the marketing of grain. The inference irresistibly follows that the duties and obligations conferred on the Supervisor by reference to the duties performed under a similar statute by a like official were duties and obligations related to the common purpose of the two acts.

Nor does it lie in the mouth of counsel representing the State to consent that this court should hold that the Supervisor, under the new Act, did not have authority to establish margins and thereby fix prices. The Act must be construed and given force, if at all, to carry out the manifest purpose and intent of the electors who passed it. The subject of margins is referred to throughout the Act. The establishing of margins is manifestly an important provision in the Act, and the one which naturally appealed to the electors and probably did more than any other provision to cause the passage of the Act. In the Lemke case, 258 U. S., at page 60, this court stated in answer to a similar suggestion made in that case:

> "It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid federal regulations of the same subject. But the features of this Act, clearly regulatory of interstate comerce, are

essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold. It is apparent that without these sections the state legislature would not have passed the Act. Without their enforcement the plan and scope of the Act fails of accomplishing its manifest purpose. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it."

We submit that Section XVII confers upon the State Supervisor, under the 1922 statute, the duties and obligations formerly performed by the State Inspector under the 1919 Act, except as the 1922 Act makes the unimportant formal changes we have heretofore discussed. The 1922 Act is in entire harmony with the exercise by the State Supervisor of the duty prescribed by Subdivision (i) of Section 2 and by Section 23 of the 1919 Act, making specific provision for establishing margins.

We submit that the statute of 1922 is a direct interference with the purchasing of grain in North Dakota in interstate commerce and places a direct burden upon that commerce; that in these respects it does not differ in any material or substantial manner from the statute of 1919 declared invalid by this court. This appears from a comparison of the two Acts, and the conclusion is made irresistible by the provisions of Section XVII of the 1922 statute, which clearly incorporates in the new Act the very provisions of the former Act which this court determined were in conflict with the Constitution.

II.

THE NORTH DAKOTA GRAIN GRADING ACT OF 1922 CONFLICTS WITH THE UNITED STATES GRAIN STANDARDS ACT AND WITH ITS ADMINISTRATION AND ENCROACHES UPON THE FIELD OF REGULATION OCCUPIED BY IT.

It is now elementary that where the question is whether or not a State law is in conflict with a Federal law, the entire scheme and purpose of the Federal statute must first be considered.

For instance, in the case of *Savage v. Jones,* 225 U. S. 501, 533, which is the case, or at least the type of case, on which the appellant chiefly relies in connection with this phase of the case this court said:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

What then is the scheme and purpose of the United States Grain Standards Act?

The Circuit Court of Appeals of the 8th Circuit, in the course of its opinion holding that the North Dakota Grain Grading Act of 1919 conflicted with the United States Grain Standards Act, found that by the Federal act "Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce."

Farmers Grain Company of Embden v. Langer, 273 Fed. 635, 651.

The Secretary of Agriculture likewise considers that uniform inspection and grading of grain in *all* markets in the United

States is the principal purpose of the Federal act, when in service and regulatory announcements No. 36 at page 2 the Department of Agriculture states:

> "The principal purpose of the Grain Standards Act is to provide for the establishment of standards for each class of wheat, or other grain as the case may be, to be effective for the inspection and grading of such grain *at all markets* in the United States, and for the supervision of inspection and grading under those standards so that any particular lot of grain should be given the same grade anywhere in the United States."

Even the appellants do not pretend that the Federal act can serve any other purpose than to secure the uniform application of uniform grades to all grain included within interstate commerce. On pages 8 and 9 of the appellants' brief, the following statements appear:

> "It is the intent of said Act (the Federal Act) that all grain included within interstate commerce should be graded and inspected in accordance with the *grades* fixed by the Secretary of Agriculture under that act. *This is the single great purpose of the Federal act.*
>
> "We have seen that the purpose of the Federal act is to secure *the uniform use of certain grades and standards,* as fixed by the Secretary of Agruculture."

There is therefore no apparent difference of opinion as to the general scheme and purpose of the United States Grain Standards Act. It is obvious that in enacting this law, Congress reached the conclusion arrived at some time ago by Judge Sanborn in *Globe Elevator Company v. Andrew,* 144 Fed. 871, that

> "So important a matter as the fixing of grades in which grain in interstate transportation can be sold and without which it can not be sold on any large scale, admits of one uniform system or plan of regulation and only one."

The purpose of Congress in enacting the Grain Standards Act to secure the uniform grading of wheat and other grains in interstate commerce throughout the United States is, of course, to be found in the first instance in the act itself. The marked uniformity of opinion on the subject is merely the result of

necessary implication from the terms of the act. It stands admitted, and can not with any semblance of justification be disputed, that Congress has undertaken to supervise and regulate the grading of grain in interstate commerce with a view to securing the uniform application of standardized grades.

Turning then to the other legislation involved, what is the purpose of the North Dakota Grain Grading Act of 1922?

To determine this it is unnecessary to go beyond the express statement of the North Dakota legislature in the preamble to the Act.

> "An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading wheat and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors and warehouse handling such farm products; and making an appropriation therefor."

That "the marketing of farm products" in North Dakota is interstate commerce has been conclusively settled, at least insofar as wheat and other small grains are concerned, by the decision of this court in the Lemke case. Obviously therefore insofar as the general scheme and purpose of the two Acts are concerned, they are each designed to apply to the same subject matter. The Federal government, in the exercise of its undisputed power to regulate interstate commerce, has seen fit to adopt an Act intended to accomplish the uniform application of standardized grades to all grain in interstate commerce; and North Dakota has attemtped to supplement the Federal Act by compelling the application to all grain sold in interstate commerce in North Dakota of the Federal standards, but under the North Dakota Act this application is to be made under the supervision of and regulation by the State officials and not the Federal officials.

It is a matter of common knowledge that the terminology

used in grading grain is of no material importance; that the important feature of grain grading is the exercise of judgment by the person doing the grading. For instance, we find that under the regulations promulgated by the Department of Agriculture under the Grain Standards Act, there are five classes of wheat, each one divided into three sub-classes and each sub-class re-divided into five grades. We find that Red Winter wheat, which is one of the sub-classes of Soft Red Winter wheat (class 4) is described as follows:

> "This sub-class shall include wheat of the class soft red winter consisting of both light and dark colored kernels. This sub-class shall not include more than 10% of soft red winter wheat possessing the characteristics of wheat of this class as grown west of the great plains area of the United States."

Or again we find Dark Northern Spring wheat, one of the sub-classes of Hard Red Spring wheat (class 1) is described as follows:

> "This sub-class shall include wheat of the class hard red spring consisting of 75% or more of dark, hard and vitreous kernels. This sub-class shall not include more than 10% of wheat of the variety hump backed."

It is apparent that the grading of wheat can not be done with mathematical precision. What are the characteristics of soft red winter wheat as grown west of the great plains area of the United States? When is the kernel a dark, hard and vitreous kernel? These are questions on which the judgment even of experts must necessarily differ. Furthermore, we find in the regulations promulgated by the Department of Agriculture specific instructions as to the manner of determining the test weight of grain per bushel; the manner of determining the percentage of dockage contained in the grain and detailed specifications of the apparatus prescribed for use in grading grain.

From the foregoing it is manifest that the mere establishment of standard grades for grain does not and can not assure the giving of the same grades to all grain of a similar quality

and condition. These standard grades simply furnish the terminology by which the results of an inspection can be made known. They do not insure uniform inspection. This can only be insured by a single control and supervision over inspectors, and the existence of a separate and independent control and supervision by State officials over the inspection and grading of grain purchased in interstate commerce in North Dakota necessarily and inevitably defeats the whole scheme and purpose of the Federal Act to procure the uniform application of standardized grades.

The vital importance of a single control and supervision over the manner in which grain grades are applied in bringing about uniformity in the grading of grain was clearly recognized by Congress in the Grain Standards Act by *requiring* the Secretary of Agriculture to issue Federal licenses to all persons authorized to inspect and grade grain under the laws of any State having a grain inspection department. This proviso was obviously inserted to enable the harmonious administration of State grain inspection laws as applied to intrastate transactions and the Grain Standards Act as applied to interstate transactions. It enables the Federal authorities to exercise the necessary control and supervision over State grain inspectors whenever they grade grain in interstate commerce.

With this provision in force there is a simple and obvious means available to any State whereby they can readily provide for impartial and disinterested inspectors and the grading of grain in interstate commerce under the supervision of the Department of Agriculture. The adoption of such a system results in the harmonious and efficient administration of Federal and State laws and is entirely consistent with the purpose of the Federal Act to procure the uniform application of Federal grades. Such a system does not, however, give to the State authorities any control or supervision over the grading of grain in interstate commerce. The State inspectors are also Federal inspectors and when they enter the field of interstate commerce

their decisions are subject to review by the Federal authorities and not by the State authorities.

This system, however, was not satisfactory to North Dakota because North Dakota was not interested in procuring a fair and uniform application of the Federal grades but was interested in and determined to procure the control and supervision by the State authorities over the grading of grain. This is the only conceivable explanation of the requirement of the North Dakota statute that the buyers of grain take out licenses to grade. The State has intentionally selected a class of grain inspectors who are not qualified as inspectors under the Federal Act. In this manner they have sought to divest the Federal authorities of all control over the grading of grain in interstate commerce in North Dakota and have sought to defeat the single great purpose of the Grain Standards Act. The North Dakota Act not only applies to the same subject matter as the Federal Act but is an obvious attempt to defeat the purpose which Congress has sought to accomplish.

The jealousy between State and Federal departments which come in contact is a matter of common knowledge. It has been the cause of frequent and extended litigation. Even now there is pending in Minnesota litigation involving a serious controversy over the relative rights of the State and Federal governments in the control and regulation of the stockyards. From time to time this jealousy becomes so inflamed in some section of the country that it leads to local legislation designed to prevent the accomplishment of some great purpose which Congress, in the exercise of the powers conferred upon it, has undertaken to accomplish. Whenever this situation has arisen this court has never failed to put its stamp of disapproval in no uncertain terms on such efforts to hamper and impede the effective exercise by the Federal government of the functions and powers conferred on it.

So it was that Wisconsin was reprimanded for attempting to defeat the effective enforcement of the Federal Pure Food

Act in *McDermott v. Wisconsin,* 228 U. S. 115; and statutes of Texas and North Carolina were held invalid because they conflicted with the great purpose which Congress sought to accomplish by the Interstate Commerce Act, "whereby Congress has taken control of the subject of rate making and charging," in *Gulf, Colorado & Santa Fe. R. R. Co. v. Hefley,* 158 U. S. 98, and *Southern Ry. Co. v. Reid,* 222 U. S. 424, and the courts of Texas were rebuked for attempted interference with the general scheme of the Interstate Commerce Act in *Texas & Pacific Ry. Co. v. Abelene Cotton Oil Co.,* 204 U. S. 426.

It is not possible that this court which has at all times been the defender of the rights and supremacy of the national government in the exercise of powers delegated to it, will not recognize in the North Dakota Grain Grading Act of 1922 a thinly veiled defiance of, and rebellion against, the accomplishment of the avowed purpose expressed by Congress in the Grain Standards Act.

It is futile to argue that the sale of grain in North Dakota is a distinct and separate field which Congress has not sought to regulate. It is an undisputed fact that the uniform application of standardized grades, to be accomplished through a single control and supervision, is the object which the Grain Standards Act is aimed at. The means by which this object shall be attained are exclusively for the determination of Congress. Congress has passed a law which, in its judgment, is designed to effect a recognized purpose, and any omission from, or limitation in, such an Act are just as much the will of Congress as the expressed provisions of the Act. The Federal government has expressed its purpose to take over the supervision and regulation of the inspection and grading of grain in interstate commerce. Having done so, its right of supervision and regulation is clearly exclusive. Congress has expressed a purpose to bring about uniformity in the grading of grain in interstate commerce. Having undertaken to accomplish this result, it devolves upon Congress alone to determine the extent of the

supervision and regulation necessary to bring about the desired result. If, in seeking to accomplish its purpose, Congress leaves any particular type of transaction unregulated, it can only be because it considered regulation of such a transaction undesirable unnecessary to accomplish its purpose.

No other body can go behind the purpose or result sought by Congress and set up regulations which they consider desirable on the pretense that by failing to make such regulations Congress has left the field open to them. The action of Congress pursuant to an admitted purpose involves not only a determination of what regulations are necessary but also a determination of what regulations are unnecessary, and this determination is final. The Grain Standards Act, involving, as it admittedly does, an expression of the purpose of Congress to establsh uniformity in the grading of grain in interstate commerce, constitutes not only a decision by Congress as to what must be regulated in order to bring about the desired result, but also a decision as to what should not be regulated, and, if, as the appellants contend, the Federal government has not attemtped to regulate or supervise the grading of grain at the time of the sale by the producer to the local elevator in North Dakota, it must be assumed that this omission is intentional and was considered undesirable unnecessary to accomplish the purpose of the Act.

This principle was stated by this court in *Northern Pacific Railway v. Washington*, 222 U. S. 370, 378, as follows:

> "It is elémentary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

Under such circumstances it can not be contended that the state is simply supplementing the action of the federal authorities. This was clearly brought in *Erie Railroad Company v. New York*, 233 U. S. 671, 683. The Act of Congress involved

in that case was the so-called "Hours of Service" law limiting railroad employees to a nine-hour day. New York adopted a law limiting certain railroad employees to an eight-hour day. In face of the contention on the part of the State that in so doing New York was simply supplementing the Federal legislation and increasing the margin of safety prescribed by the Federal law, this court held the State Act unconstitutional as in conflict with the Federal law. The following quotation from the opinion of Mr. Justice McKenna is instructive and directly applicable to the case at bar:

> "The reasoning of the opinion and the decision oppose the contention of defendant in error and of the Court of Appeals, that the state law and the Federal law can stand together, because, as expressed by the Court of Appeals, 'the state has simply supplemented the action of the Federal authorities,' and, on account of special conditions prevailing within its limits, has raised the limit of safety; and the form of the Federal statute, although 'not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary.'
>
> We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.
>
> Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it."

Applying these principles to the present case, we find that Congress has expressed its purpose to exercise its unquestioned right to control interstate commerce in grain with the object of bringing about uniform grading and has amply authorized

the Secretary of Agriculture to establish such regulations as he may deem necessary to carry out this purpose. This court clearly pointed out in the Lemke case that the original sale of the grain in North Dakota is a part of this interstate commerce in grain which the Secretary of Agriculture has been authorized to regulate. The Act and the regulations promulgated thereunder may not be entirely satisfactory to certain groups or sections but they can not be regarded as having been promulgated without due consideration of the public interest and they admit of no supplement; they are the prescribed measure of what is necessary and sufficient for the public interest. The State of North Dakota by its Grain Grading Act of 1922 seeks to establish a separate, distinct and independent control of the grading of grain in interstate commerce, which is not consistent with uniformity and is diametrically opposed to the purpose which Congress has so clearly manifested.

It is significant that by the presentation of two of the Bills to which we have already called the court's attention, Congress has been asked to amend the Grain Standards Act by specific provision that it shall not be held to apply at any time prior to the delivery of the grain to a carrier, and by the third Bill referred to, Congress was asked to exclude from interstate commerce all transactions prior to the delivery of the grain to a carrier. These suggestions were all made after the decision in the Lemke case. It follows that whatever might be said as to the intention of Congress at the time of the original passage of the Grain Standards Act, it is now clear, beyond the possibility of doubt, that Congress fully understands its right to regulate the original purchase of the grain in North Dakota and has specifically refused to admit the right of the State of North Dakota to regulate this transaction.

The failure of Congress to pass these bills is a further expression of its determination that in order to accomplish the purpose of the Grain Standards Act it is not necessary or desirable to have the grading of grain in interstate commerce

regulated or controlled beyond the regulation and control provided for by the Grain Standards Act. By the presentation of these bills their North Dakota proponents inferentially but none the less clearly indicated their opinion that in the absence of some such qualifying legislation there is no room for State interference. By refusing to adopt the suggested qualifications Congress has expressed its intention that there shall be no interference by the states.

Again we can not refrain from calling attention to this court's comments in the Lemke case in answer to the claim that the interest of the farmer demands some regulation of the purchase of grain in North Dakota. There is no need to either concede or argue this question. If it be true, the remedy lies with Congress, which is amply authorized to adopt any measures which may be necessary. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of state laws made in defiance of national legislation. Apparently North Dakota is unable to convince Congress of the need of additional legislation. If so, the necessary inference is that the inconveniences and wrongs are entirely imaginary. This we believe is the true situation.

THE CASES SUSTAINING STATE LEGISLATION IN FIELDS WHICH HAVE NOT BEEN OCCUPIED BY CONGRESS ARE NOT IN POINT AND ARE NOT APPLICABLE TO THE PRESENT SITUATION.

Savage v. Jones, 225 U. S. 501, is typical of the cases applying this principle. In that case certain state legislation was claimed to be in conflict with the Federal Food and Drugs Act. As to the object and purpose of the Federal legislation this court found at page 529 that:

> "The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any State from any other State 'of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act.' The purpose is to keep such articles 'out of the channels of inter-

state commerce, or, if they enter such commerce to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages.' "

The state legislation which was attacked required that before any feed of the character covered by the Act should be sold, there should be filed with the state officials certain information regarding the manufacturer and the ingredients of the feed and that similar information should be plainly printed on every package.

Obviously, there was no conflict here. *The Federal Act did not undertake to establish any uniform rule.* Its object and purpose, as found by this court, was a negative and limited one, namely, to prohibit interstate commerce *in certain specified articles.* It did not attempt to establish any uniform standard for determining the purity of food. It was on its face not an exclusive measure but one which selected certain of the more glaring offenses and condemned them, and it was for this reason that this court found that the failure on the part of Congress to condemn the acts which were condemned by the state statute did not involve a determination by Congress that such acts should not be prohibited. In other words, there was no indication that Congress had undertaken to establish a uniform and exclusive rule for the regulation of all interstate commerce transactions.

In this respect the Grain Standards Act is fundamentally different from the Food and Drugs Act. It has no other purpose than the establishment of uniform grading of grain. If it fails in its accomplishment of this purpose it can serve no conceivable purpose and it is this very purpose with which the North Dakota Act conflicts. There can not be uniform grading of grain in interstate commerce if both statutes are effective.

When the case arose where a state did attempt to interfere with the accomplishment of the limited purpose of the

Food and Drugs Act, it did not escape condemnation on the principle of *Savage v. Jones.*

McDermott v. Wisconsin, 228 U. S. 115.

All of the other cases which have been decided on the principle of *Savage v. Jones* involve Federal legislation of a character similar to the Food and Drugs Act. *Corn Products Refining Company v. Eddy,* 249 U. S. 427, also arose under the Food and Drugs Act and was decided on the authority of *Savage v. Jones* because here again the state statute could be sustained without impairing, in the slightest degree, the operation and effect of the Federal Act, there being no question involved of conflicting standards and there being no evidence of any purpose which Congress sought to accomplish which would be defeated by the state legislation.

The same situation has led to the same result in the cases involving state legislation alleged to conflict with the Federal Animal Industry Act.

Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S. 613.
Asbell v. Kansas, 209 U. S. 251.
Reid v. Colorado, 187 U. S. 137.

In the case last cited, the court carefully examined the national legislation and concluded that Congress had not undertaken to establish any general system for suppressing and extirpating contagious, infectious and communicable diseases dangerous to the health of domestic animals, and that the state legislation designed to accomplish this purpose was not in conflict either with the express terms or the general purpose of the national legislation.

The distinction between the cases upholding state legislation because it occupies a field not covered by a Federal statute and the cases condemning state legislation, even though it applies to transactions not specifically covered by the Federal Act, lies in the nature of the Federal Act. If there is no general pur-

pose which the Federal Act seeks to accomplish, which would be defeated by state legislation, then it remains open to the states to legislate on subjects not specifically covered by the Federal Act. If, on the other hand, the Federal Act has as its object a definite general purpose, then an omission on the part of Congress to cover a particular transaction within that purpose is an expression of its determination that it is unnecessary to cover such a transaction in order to accomplish the purpose in view. Obviously, the Grain Standards Act falls within the latter class. It has and can have but one purpose, i. e., the establishment of uniform grading of grain in interstate commerce. The grading of any grain in interstate commerce therefore falls within its scope and if it is not covered specifically it is only because Congress has said it shall not be.

IN ADDITION TO THE FACT THAT THE NORTH DAKOTA GRAIN GRADING ACT DEFEATS AND INTERFERES WITH THE ACCOMPLISHMENT OF THE SOLE PURPOSE OF THE GRAIN STANDARDS ACT, THERE ARE CERTAIN SPECIFIC PROVISIONS IN THE TWO ACTS WHICH WILL NECESSARILY COME IN DIRECT AND IMMEDIATE CONFLICT IF THE TWO ACTS ARE CONCURRENTLY ADMINISTERED.

As already point out, under the 1922 North Dakota Act grain purchased in North Dakota will necessarily be graded by employees of the elevator companies. It is the grain buyer who must take out a license from the State of North Dakota. The authorized State inspectors will be persons directly interested in the grain elevators. Such persons, however, are not competent to become Federal inspectors under the Grain Standards Act which provides that:

> "No person licensed by the Secretary of Agriculture to inspect or grade grain, or employed by him in carrying out any of the provisions of this Act, shall, during the term of such license or employment, be interested financially or otherwise, directly or indirectly, in any grain elevator or warehouse or in the merchandising of grain, nor shall he

be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

North Dakota licensees therefore can not be Federal inspectors; but the Grain Standards Act by Section 7 *requires* the Secretary of Agriculture to "issue licenses to the persons duly authorized and employed to inspect and grade grain under the laws of any state which has a grain inspection department." Obviously, the Secretary of Agriculture can not comply with this requirement of the Grain Standards Act without violating its prohibition against interested inspectors.

In this respect the 1919 North Dakota Act was substantially similiar to the 1922 Act and when these features of the State and Federal Acts were called to the attention of the Circuit Court of Appeals of the 8th Circuit in the Lemke case, the court said:

> "Thus one law requires that the inspector shall have no interest in the business and the other law requires that he shall. Which law is to prevail? Certainly the Federal law, if the business is interstate commerce."
>
> *Farmers Grain Company of Embden v. Langer,* 273 Fed. 635, 652.

Another direct conflict results from the fact that the State Act taken in connection with Sections 3107, 3113 of the North Dakota 1913 Compiled Laws requires a transaction which is expressly prohibited by the Federal statutes.

Section 3107 defines a public warehouse as an elevator operated "for the purpose of buying, selling, storing, shipping or handling grain for profit." Section 3113 is as follows:

> "What Storage Receipts Shall Express. Each storage receipt issued in this state shall expressly provide that at the option of the holder of such receipt the kind, quality and quantity of grain for which such receipt was issued shall be, on his demand, delivered back to him, at any terminal point or at the same place where it was received upon the payment of a reasonable charge per bushel for receiving, handling, storage and insurance charges; and in case of terminal delivery the payment, in addition to the

above, of the regular freight charges on the gross amount called for by the tickets being surrendered—such charges to be fixed by express terms in the storage receipt at the time of receiving the grain at the elevator or warehouse, and at the time of issuing the receipt, but no charges shall be made for cleaning grain unless such grain has been actually cleaned. Nothing in this section shall be construed to require the delivery of the identical grain specified in the receipt so presented, but an equal amount of the same grade of grain or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points, for an equal amount of grain of the same grade; provided, that grain placed in a special bin be excepted from the provisions of this section."

These sections were not repealed by either the 1919 Act or the 1922 Act. Under the State law, therefore, a person can take grain to any country elevator and have it inspected and graded by the State Licensee. Necessarily the grade given the grain will be one of the United States standard grades. He may store this grain and the elevator operator is required to give him a receipt for the amount of grain so stored, designating the grade. This receipt must contain a provision that on the payment of the freight charges to any terminal, the holder is entitled to grain of the same grade at that terminal or a terminal warehouse receipt for such grain. These warehouse receipts may be transferred. By the sale and transfer of the grain covered by the receipt, any one can receive delivery at the Minneapolis terminal of that grain on payment of the storage charges and the freight. The Federal statute, however, in terms provides that:

"No person thereafter shall ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale or consigned for sale by grade unless the grain shall have been inspected and graded by an inspector licensed under this Act and the grade by which it is sold, offered for sale or consigned for sale be one of the grades fixed therefor in the official grain standards of the United States."

The dockage requirements of the North Dakota statute neces-

sarily lead to a conflict with the Federal system of grading. Under the state law the buyer is compelled to make a specific payment for dockage. At the terminal markets he is required by the Federal law to sell his grain under the Federal grading system which makes no provision for a specific payment on account of dockage. The regulations of the Secretary of Agriculture do require the Federal inspector to determine the quantity of dockage and to state the same on his certificate in terms of percentage as a part of the grade designation, and grain containing a large amount of dockage frequently brings a premium price. This dual system necessarily leads to confusion and conflict.

Another source of conflict is found in the situation which is most accurately analyzed in the following passage from the decision of the Circuit Court of Appeals in the Lemke case:

> "Section 4 of the Grain Standards Act heretofore quoted, makes it unlawful to ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale or consigned for sale by grade, unless the grain shall have been inspected and graded by an inspector licensed under the Act. By the second proviso of said section such grain may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under the Act to or through any place which an inspector licensed under the Act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe. This proviso, as we understand it, would authorize a shipment of grain in interstate commerce from a point in North Dakota where there was no licensed inspector under the Federal Act to Minneapolis or Duluth, in Minnesota, to be there inspected by a Federal Inspector. The state law, however, declares that one may not even buy a bushel of wheat for shipment in interstate commerce without taking out a license to do so and promising to obey all the provisions of the state law and the regulations of the State Inspector, and the wheat purchased must be inspected in North Dakota and again at Duluth or Minneapolis. This brings the two laws

clearly in conflict, if they both have to do with interstate commerce."

Farmers Grain Company of Embden v. Langer, 273 Fed. 635, 651.

By far the most grevious conflict between the two statutes results from the dual inspection which would necessarily result from the concurrent administration of the two Acts.

Although the 1922 North Dakota Act provides for the adoption of Federal standards and grades, the situation in this respect is no different from what it was under the 1919 Act because under the former Act the North Dakota officials did in fact adopt the Federal grades. We have already seen that the mere adoption of grades does not insure their uniform application which can only be assured by a single supervision and control.

The situation can not be judged by an examination of the situation existing in states having admittedly valid warehouse statutes of the usual and permissible sort. In Minnesota, for instance, grain inspectors are impartial and disinterested persons. On the adoption of the United States Grain Standards Act and the establishment of grades thereunder, Minnesota, like North Dakota, adopted as its standards the United States standards but in Minnesota, unlike the situation which would exist under the North Dakota Act, state inspectors are qualified to and do in fact take out licenses as Federal inspectors and when grading grain in interstate commerce they are subject to the supervision of, and their decisions are subject to review by, the Department of Agriculture. The two systems can therefore operate harmoniously and result in uniform grading of grain in Minnesota which would not be the case under the North Dakota Act.

The dual inspection which North Dakota seeks to establish will necessarily result in overlapping and conflicting regulations, unnecessary license fees, and a substantial burden on every person engaged in commerce in grain. The buyer in

North Dakota must buy under the rules and regulations promulgated by the State authorities; he must sell under the rules and regulations established by the Secretary of Agriculture. Any appeal on questions arising out of the purchase of grain must go to the State officials and any appeal on any question arising out of the sale of grain must go to the Federal authorities. At no point and by no process can he obtain one ruling or regulation covering both ends of his commerce in grain. The uncertainty, inconvenience and hardship which necessarily result from such a situation are obvious.

The record in the Lemke case shows that under the 1919 Act there was no uniformity between the application of grades by the North Dakota officials and their application by the Federal officials. As the North Dakota officials and the Federal authorities would determine the grade of grain independently each would necessarily conflict with the other. Such a conflict is not a theory but a continually existing fact. Obviously the purchaser of grain in North Dakota is between two mill stones independently operated and controlled. Statutes resulting in such a situation are clearly in conflict.

The usual warehouse Act of the type sustained in *Munn v. Illinois* has been held not in conflict with the Grain Standards Act (*Merchants Exchange v. Missouri,* 248 U. S. 365). This was on the stated ground that the State Act applied only to the weighing and warehousing of grain and did not purport to establish a system of grading and inspection applicable to all transactions in grain. Justice Brandeis makes this distinction clear when he says in that case:

> "That Act (the Federal Act) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain."

In conclusion we can not do better than quote the language of the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer,* 273 Fed. 635 at page 651, where the 1919

North Dakota Act was under consideration.

> "There remains to be considered the question as to whether the state law conflicts with the United States Grain Standards Act. As we have said with reference to the question as to whether the law is a burden on interstate commerce, so we say now that if the purchase of grain in North Dakota under the evidence in this case, and the shipment thereof to the terminal markets mentioned for sale, is a unit in interstate commerce, then, of course, any attempt to regulate that commerce by the State of North Dakota is in direct conflict with the Grain Standards Act, wherein Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce. Both Acts ought not to be and cannot be enforced, without confusion and embarrassment as the State Inspector declared."

We submit that the conflict between the two statutes is actual and substantial; that the State Act encroaches upon the field of regulation occupied by the Federal Act and would defeat and interfere with the purpose sought to be accomplished by the Federal Act; that the State Act conflicts with the Federal Act and the concurrent administration of the two Acts would result in wholly unwarranted and unnecessary confusion and embarrassment.

III.

THE 1922 ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IN THE SAME MANNER AS THE 1919 ACT.

The North Dakota statute authorizes and empowers the State Supervisor to revoke the license of any buyer, and thereby prohibit him from continuing his business of buying grain in interstate commerce, without any notice and without any opportunity afforded for a hearing. The provision for an appeal to the court from arbitrary action in this does not afford the buyer sufficient protection. He would have the right to resort to the courts to prevent such action whether there were

any provision for an appeal or not. In the meantime, however, he is deprived of the right to carry on his business and if such action were taken in the midst of the busy crop moving season, he would lose practically a year's business before the wrong could be remedied by the courts.

To prohibit in this manner the profitable use of elevators is just as much a confiscation and destruction of property as it would be for the state to actually take possession of the elevator itself. While in the earlier cases there is some confusion as to what circumstances justify a summary confiscation or destruction of property under the due process clause, it has now become well established that the nature of the property is the determining factor in each case and that in order to justify such a confiscation or destruction, the state must be prepared to show that the property is dangerous to the safety or health of the community, otherwise it can only be condemned or destroyed by legal proceedings with due notice to the owner.

Sentell v. New Orleans, etc. R. R. Co., 166 U. S. 698.

1. An elevator is property of substantial value. The business of conducting it is not a public nuisance. The property is obviously of such a nature as to require legal proceedings for its confiscation and, within the rule cited above, the taking of such property or depriving the owner of the use of it without legal proceedings deprives the owner of his property without due process of law as guaranteed by the Fourteenth Amendment.

2. The limitations and restrictions placed by the North Dakota statute on the terms on which grain may be bought in North Dakota, constitute an unlawful restriction of the liberty of contract guaranteed by the Fourteenth Amendment. As already indicated, the North Dakota statute provides for, or contemplates rules and regulations providing for, the fixing of the price at which grain can be purchased in North Dakota, the specific payment for dockage or its return to the

seller, the licensing of buyers as a condition precedent to their right to purchase grain and the giving of security by the buyer whenever he purchases on credit. In short, the statute purports to make the contract between the buyer and the seller for them and without regard to their wishes. If this statute remains in force, no grain can be bought in North Dakota excepting under a contract of purchase, every important term of which is fixed by, or subjected to regulation by, the state authorities. Such a situation is a clear violation of the constitutional guarantee of liberty of contract.

In the insurance case (*German Alliance Insurance Company v. Kansas,* 233 U. S. 389), and in the rent cases (*Block v. Hirsh,* 256 U. S. 135, 65 L. Ed. 531, and *Marcus Brown Holding Co. v. Feldman,* 256 U. S. 170, 65 L. Ed. 539), we find the border line of the legislative power to regulate contracts. These decisions rest on existing situations. In the insurance case, because of the nature of the business, a few companies had obtained control of the rates of insurance and all persons desiring protection were obliged to deal with these companies. This condition does not exist in the grain business. Twenty-two hundred elevators compete with each other in buying grain. Many of them are farmers' co-operative companies. These co-operative companies establish the conditions under which grain is bought at country elevators. A producer is not dependent upon the country elevator. He may ship his grain to a terminal market. There is not and cannot, in the nature of things, be a control of market conditions of grain buyers similar to the control of insurance rates by the large companies. The rent cases involved an extarordinary and peculiar public hardship and necessity. Legislation regulating the marketing of grain falls outside the boundary line of legislative control of contracts established by the insurance and rent cases.

We submit that the North Dakota statute constitutes an infringement of rights guaranteed by the Fourteenth Amendment as well as a direct and substantial burden on interstate com-

merce and a source of conflict with the United States Grain Standards Act.

Respectfully submitted,

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